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Supreme Court of the United States

October Term, 1975
No. 75-145

THE NORTHERN CHEYENNE TRIBE,
Petitioner,

v.

WILLIAM HOLLOWBREAST, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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THE NORTHERN CHEYENNE TRIBE,
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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 505 F.2d 268 (1974). The opinion of the District Court for the District of Montana is reported at 349 F.Supp. 1502 (1972).

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on October 17, 1974. On December 28, 1974, Associate Justice William O. Douglas of the United States Supreme Court entered an order extending

the time to file a petition for writ of certiorari to March 1, 1975. On February 19, 1975, Associate Justice William J. Brennan, Jr. of the United States Supreme Court entered an order further extending that time to March 16, 1975. On February 20, 1975, Petitioner filed with the Ninth Circuit Court of Appeals a motion for leave to file an untimely petition for rehearing. On February 28, 1975, the Ninth Circuit Court of Appeals entered an order granting Petitioner leave to file a petition for rehearing and recalling the original mandate. On March 14, 1975, Petitioner filed a petition for rehearing with the Ninth Circuit Court of Appeals. The Court of Appeals invited Respondents to submit briefs, considered the petition for rehearing on the merits, and on April 28, 1975, entered an order denying the petition for rehearing. The petition for certiorari was filed within 90 days of that date, and was granted on October 14, 1975. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) (1970).

QUESTIONS PRESENTED

In 1926, Congress enacted the Northern Cheyenne Allotment Act, 44 Stat. 690, which withheld all reservation minerals from allotment—but provided that these minerals would become the property of the allottees or their heirs after 50 years. However, in a 1968 amendment to the Act, 82 Stat. 424, Congress provided that the minerals would remain in tribal ownership in perpetuity.

1. Did the 1926 Act, as amended, endow the allottees, their heirs or devisees[1] with a vested property right in the

1. The 1926 Act specified "the allottees, or their heirs" as recipients of that future allotment. In 1961, Congress amended the Act to add devisees to that group of prospective allottees. Act of September 22, 1961, 75 Stat. 586 (page A-5, *infra*).

minerals which is protected by the Fifth Amendment?

2. Did Congress, in enacting the 1926 Act, as amended, relinquish the power to alter the statutory plan contained therein for allotment of the minerals after 50 years?

CONSTITUTIONAL AND STATUTORY PROVISIONS AND EXECUTIVE ORDERS INVOLVED

United States Constitution, Amendment V:

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Northern Cheyenne Allotment Act, Act of June 3, 1926, 44 Stat. 690, as amended by: Act of July 24, 1947, 61 Stat. 418; Act of September 22, 1961, 75 Stat. 586; Act of July 24, 1968, 82 Stat. 424. These statutory provisions are set out at A-1-7, *infra*.

Executive Order of November 26, 1884, I C. KAPPLER, INDIAN AFFAIRS—LAWS AND TREATIES 860 (1904), which created the Northern Cheyenne Reservation; Executive Order of March 19, 1900, I C. KAPPLER, INDIAN AFFAIRS —LAWS AND TREATIES 860 (1904), which enlarged the Northern Cheyenne Reservation; these executive orders are set out at A-7-9, *infra*.

STATEMENT

The petitioner The Northern Cheyenne Tribe is an Indian tribe situated in southeastern Montana upon the 444,000-acre Northern Cheyenne Reservation. Out of a total tribal population of approximately 3,600 enrolled members, roughly 3,000 tribal members live on the Reservation. Organized under a tribally-ratified and federally-

approved constitution and by-laws,[2] the Northern Cheyenne Tribe is governed by a tribal council whose members are duly elected on a district basis by the Northern Cheyenne people.[3]

The respondents William Hollowbreast *et al.* are a class of 1,481 allottees, their heirs, or devisees,[4] owning allotments of surface land upon the Northern Cheyenne Reservation. While the class consists mainly of Northern Cheyenne tribal members, approximately 250 persons in the class are not Northern Cheyenne tribal members[5] and 539 persons in the class—more than one-third of the class—live off the Reservation[6] in various and sundry locations.[7]

The history of the Northern Cheyenne Reservation dates to 1884, when the Reservation was created by Executive

2. "[T]he Northern Cheyenne Tribe of the Tongue River Reservation in Montana is a recognized Indian Tribe organized under a constitution and by-laws ratified by the Tribe on November 2, 1935 and approved by the Secretary of the Interior on November 23, 1935, pursuant to section 16 of the Act of June 18, 1934, (48 Stat. 984), as amended by the Act of June 15, 1935 (49 Stat. 378). . . ." DEP'T OF THE INTERIOR, CORPORATE CHARTER OF THE NORTHERN CHEYENNE TRIBE OF THE TONGUE RIVER RESERVATION (1937).

3. DEP'T OF THE INTERIOR, CONSTITUTION AND BY-LAWS OF THE NORTHERN CHEYENNE TRIBE OF THE TONGUE RIVER RESERVATION art. III, §§1-2 (1957).

4. R. 10, 174.

5. R. 407.

6. R. 20-80, 174.

7. The allottees, heirs and devisees reside throughout the United States in such locations as Seattle (R. 21, 23, 27, 28, 32, 38, 64), Portland (R. 21, 23, 47), San Francisco (R. 32, 70), Los Angeles (R. 21, 28, 31, 49, 61, 62, 78, 174), Pasadena (R. 47, 54), Phoenix (R. 56, 77, 80), Salt Lake City (R. 28), Albuquerque (R. 37, 77), Dallas (R. 57), Oklahoma City (R. 40), Denver (R. 25, 35, 46, 49, 64, 68, 73), Minneapolis (R. 32, 71, 72), Chicago (R. 32, 54), Cleveland (R. 61), New York City (R. 35, 65), Groton, Connecticut (R. 56), Bayonne, New Jersey (R. 44), Baldwin, Florida (R. 71), Fort Walton Beach, Florida (R. 72), and Honolulu, Hawaii (R. 80).

Order of November 26, 1884.[8] Three years later the fate of America's Indian reservations was significantly affected by Congress' enactment of the General Allotment Act of 1887.[9] While many reservations were allotted shortly thereafter, thirty-nine years transpired before Congress adopted an allotment plan for the Northern Cheyenne Reservation in 1926;[10] six years later—in 1932—actual allotment commenced, while less than two years thereafter—in 1934—Congress chose to terminate the practice of allotment by its enactment of the Indian Reorganization Act.[11]

a. The Northern Cheyenne Allotment Act of 1926

The 1926 Act is a straightforward piece of legislation; its formulation is clear and logical. Section 1 declares the entire Reservation to be the property of the Tribe. This was the first explicit congressional confirmation of the Tribe's title to the Reservation. It endowed the Tribe with "recog-

8. I C. KAPPLER, INDIAN AFFAIRS—LAWS AND TREATIES 860 (1904) (pages A-7-8, *infra*). A further Executive Order in 1900 enlarged the Northern Cheyenne Reservation by expanding its eastern boundary to the Tongue River. Executive Order of March 19, 1900, I C. KAPPLER, INDIAN AFFAIRS—LAWS AND TREATIES 860 (1904) (pages A-8-9, *infra*).

9. Act of February 8, 1887, 24 Stat. 388, 25 U.S.C. §331 *et seq.* (1970). *See generally* D. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS (1973 ed.); W. WASHBURN, THE ASSAULT ON INDIAN TRIBALISM: THE GENERAL ALLOTMENT LAW (DAWES ACT) OF 1887 (1975).

10. Act of June 3, 1926, 44 Stat. 690 (pages A-1-4, *infra*).

11. Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. §§461-79 (1970). Actually, the termination-of-allotment provision (§461) and all other provisions of the Indian Reorganization Act are only binding if tribally approved (§478). However, in accordance with §478 of the Act, on October 27, 1934, the Northern Cheyenne people affirmatively voted to become subject to the Indian Reorganization Act. NAT'L ARCHIVES, INSPECTION REPORT—NORTHERN CHEYENNE INDIAN RESERVATION, Record Group No. 75, Box 148, Folder 150 at 1.

nized" title to the lands, a vested property interest.[12] In addition, section 1 explicitly states Congress' continuing plenary power over the entire Reservation:

> That the Northern Cheyenne Indian Reservation heretofore set apart by Executive order dated the 19th day of March, 1900, for the permanent use and occupation of the Northern Cheyenne Indians in Montana, be, and the same is hereby, declared to be the property of said Indians, subject to such control and management of said property as the Congress of the United States may direct. [emphasis added][13]

The Act's allotment provisions are contained entirely within section 2. This section authorizes limited, 160-acre allotments of agricultural and grazing lands to living tribal members. Allotment was to be consummated by the issuance of a trust patent designating the entire allotment as a homestead, inalienable for 25 years or until death of the allottee:

> Sec. 2. That the Secretary of the Interior be, and he is hereby, authorized to cause to be prepared a complete roll containing the names of all said Northern Cheyenne Indians now living, for whom said reservation was set apart as aforesaid, which roll, when approved by him, shall be the basis for allotting the land on said reservation as herein provided. The Secretary of the Interior shall also cause to be prepared, in such manner as he may deem advisable, a list of the lands of said Indian reservation and to classify same as agricultural, grazing, and land chiefly valuable for the timber thereon. As soon as practicable after the approval of said tribal roll and after the approval of said list of lands classified as above provided, the Secretary of the Interior is hereby authorized to allot

12. *See generally Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942); *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169 (1947); *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949) (dictum).

13. Page A-1, *infra*.

> in severalty lands classified as agricultural and grazing to duly enrolled Indians in areas not exceeding one hundred sixty acres to any individual from the lands appearing on said approved lists . . . *Provided*, That trust patents shall be issued therefor of the form and legal effect authorized by the Act of February 8, 1887 (Twenty-fourth Statutes at Large, page 388), as amended, and the lands so allotted and patented shall be designated in each case as a "homestead," which homestead shall remain inalienable and nontaxable for a period of twenty-five years from the date of issuance of patent therefor, or until the death of the allottee.[14]

The remainder of the 1926 Act is primarily concerned with identifying those portions of the Reservation immune from allotment—remaining, therefore, in the ownership of the Tribe. Section 3 excludes all reservation minerals and timber from allotment[15] and announces Congress' plan for transferring the minerals beneath each allotment to the allottee or his heirs after 50 years. Finally, this section explicitily asserts Congress' continuing plenary power over all property withheld from allotment. In addition, tribal leasing of those expressly-unallotted minerals and timber is authorized:

> Sec. 3. That the timber, coal or other minerals, including oil, gas, and other natural deposits, on said reservation *are hereby reserved for the benefit of the tribe* and may be leased with the consent of the Indian council under such rules and regulations as the Secretary of the Interior may prescribe: *Provided*, That at the expiration of fifty years from the date of the approval of this Act the coal and other minerals, in-

14. Pages A-1-2, *infra*.

15. However, in 1947, by amendment to the Act, timber on the allotments was granted to the allottees. The 1947 Amendment made a present grant of the timber in the following terms: ". . . the timber on the allotments on the Northern Cheyenne Indian Reservation . . . are hereby declared to be the property of the allotees. . . ." Act of July 24, 1947, 61 Stat. 418 (page A-4, *infra*).

cluding oil, gas, and other natural deposits, of said allotment shall become the property of the respective allottees or their heirs:[16] *Provided further,* That the *unallotted* lands of said tribe of Indians shall be held in common, *subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians.* [emphasis added][17]

Section 4 enumerates additional portions of the Reservation which are withheld from allotment. It also provides that all income from the leasing of minerals and timber be held as tribal property—for the benefit of the Tribe as a whole. Section 5, the final section of the Act, deals exclusively with appropriations.

Allotments were not in fact made until 1932; approximately 53 per cent of the Reservation surface was ultimately allotted. The trust patent making an allotment provides in relevant part:

NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, has allotted, and by these presents does allot, unto the said Indian the above-described land as a Homestead, subject to all the provisions, conditions, limitations and restrictions contained in said Act of June 3, 1926. . . . *There is also reserved for the benefit of the Northern Cheyenne Indians, all the coal or other minerals, including oil, gas, and all natural deposits in said land.* [emphasis added][18]

From the time of allotment through the mid-1960s, tribal development of reservation minerals—envisioned by Con-

16. The 1926 Act specified "the allottees or their heirs" as recipients of this future allotment. However, in 1961, Congress amended the Act to add "devisees" to that group of prospective allottees. Act of September 22, 1961, 75 Stat. 586 (page A-5, *infra*).

17. Page A-2, *infra*.

18. Appendix at A-45-46.

gress in the 1926 Act[19]—had not occurred. However, in the late-1960s it became apparent that the Northern Cheyenne Tribe, might, for the first time, actually be in a position to develop its mineral resources. However, this potential development—which would occur through strip-mining—was fraught with serious ramifications; the continued existence of the Northern Cheyenne homeland and culture were put in question.[20] These circumstances led to the enactment of a 1968 amendment[21] to the Northern Cheyenne Allotment Act of 1926.

b. The 1968 Amendment to the Northern Cheyenne Allotment Act

The 1968 Amendment was based upon Congress' conclusion that it would violate the best interests of the Northern Cheyenne Tribe to carry through with the prior plan of transferring the minerals to the allottees, their heirs, or devisees in 1976; hence, Congress decided that all minerals

19. To this end, the 1926 Act authorized leasing of the minerals with the consent of the Tribal Council and provided that all income therefrom would be held in trust to be expended for the benefit of the Tribe. As stated by the House sponsor of the 1926 Act upon its passage:

> This is a very important bill to the Indians, because it not only provides an allotment of 160 acres to each member of the tribe, but it also preserves tribal grazing and timber land for the benefit of the entire tribe, and offers a means for the development of any mineral resources, such as oil, which may be discovered on the reservation, for the benefit of the tribe. In other words, it finally and fully confirms the title of the tribe in such a way as to develop their homes and give the Indians the fullest possible benefit of their natural resources. . . .

67 CONG. REC. 9886 (1926) (remarks of Representative Scott Leavitt—Montana).

20. *See* section 5, *infra*.

21. Act of July 24, 1968, 82 Stat. 424 (pages A-6-7, *infra*).

on the Reservation should continue to be tribally-owned.[22] Accordingly, Congress repealed the executory portion of its original Northern Cheyenne allotment plan. Section 3 of the 1926 Act was amended to read:

> Sec. 3(a) The coal or other minerals, including oil, gas, and other natural deposits, on said reservation are hereby reserved in perpetuity[23] for the benefit of the tribe and may be leased with the consent of the Indian council for mining purposes in accordance with the provisions of the Act of May 11, 1938 (52 Stat. 347; 25 U.S.C. 396a-f, under such rules, regulations, and conditions as the Secretary of the Interior may prescribe.
>
> (b) The unallotted lands of said tribe of Indians shall be held in common, subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians.[24]

While Congress did in fact pass the 1968 Amendment above, it felt that this Amendment presented a particular

22. "If the mineral resources are reserved to the tribe in perpetuity, the income can be used for the benefit of all tribal members. If the minerals are allowed to become the property of the individual allottees, some persons will benefit greatly, and others will not benefit at all, depending upon where the minerals happen to be found." H.R. REP. No. 1292, 90th Cong., 2d Sess. 2 (1968); S. REP. No. 1145, 90th Cong., 2d Sess. 2 (1968).

23. The House of Representatives had originally proposed that the 1968 Amendment extend tribal ownership for an additional 50 years. However, this finite extension was rejected in favor of perpetual tribal ownership—for the following reasons:

> As amended and passed by the House, H.R. 5704 would reserve the minerals for the benefit of the tribe in perpetuity, rather than for an additional 42 years as provided in the original bill. This provision was recommended by the Department of the Interior because a reservation for the original 50 years plus an additional 42 years, a total of 92 years, at the end of which time the minerals become the property of the heirs of the original allottees, would create an extremely difficult and costly requirement for determining the heirs. Inasmuch as the purpose of the bill is to retain the title in the tribe until the minerals have been substantially extracted, it would be unreasonable to go through the heirship procedure.

S. REP. No. 1145, 90th Cong., 2d Sess. 2 (1968).

24. Act of July 24, 1968, 82 Stat. 424 (page A-6, *infra*).

constitutional question. In light of the Fifth Amendment, Congress was concerned that the 1926 Act[25] had possibly endowed the allottees, their heirs, or devisees with a vested, constitutionally-protected property right to the future distribution of the minerals. Thus, Congress made the effectiveness of the 1968 Amendment contingent upon the bringing of this suit to determine this issue.[26] Section 2 of the 1968 Amendment stipulates:

25. As amended in 1947 to allot timber (*see* note 15, *supra*) and as amended in 1961 to add devisees to the group of prospective allottees (*see* note 1, *supra*).

26. The original proponent of this litigation provision of the 1968 Amendment, the Department of Interior, recommended it only out of a desire to insulate absolutely the United States from the possibility of a damage claim by the allottees. On the merits of the legal issue, the Department stated:

> We believe that this problem is not one of great significance, because we believe that a sound argument can be developed which would support the proposition that this expectancy is not a compensable interest.

S. REP. No. 1145, 90th Cong. 2d Sess. 4 (1968). The House Committee on Interior and Insular Affairs retained the provision for the same reason, although believing that the extension of the minerals' reservation-period was within Congress' power. H. REP. No. 1292, 90th Cong. 2d Sess. 3 (1968).

Indeed, in 1961, Congress, without any hesitation whatsoever, amended the Northern Cheyenne Allotment Act in a manner which in three substantial respects diminished the allottees' future interest in the minerals (Act of September 22, 1961, 75 Stat. 588) (pages A-5-6, *infra*):

(1) the Tribe was given authority to encumber the future interest by entering into mining leases during the 50-year period of the minerals reservation, which could extend indefinitely beyond the year 1976;

(2) the class of persons holding the future interests in the minerals was changed; it was expanded from the "allottees or their heirs" to the "allottees or their heirs or devisees;" accordingly, ascertained and existing heirs of those original allottees who had made wills and died before the 1961 Amendment were divested of their future interests in the minerals—those interests being transferred by the Amendment to the devisees under the wills; and

(3) the allottees were divested of any right to convey their future interest in the minerals during the period of the 50-year reservation; and, all such conveyances made prior to the 1961 Amendment were nullified. Added Note: the district court ruled on September 30, 1971, that this case presents a justiciable case and controversy within the meaning of Article III, Section 2 of the United States Constitution. This ruling was not appealed.

The Northern Cheyenne Tribe is authorized to commence in the United States District Court for the District of Montana an action against the allottees who received allotments pursuant to the Act of June 3, 1926, as amended, their heirs or devisees, either individually or as a class, to determine whether under the provisions of the Act of June 3, 1926, as amended, the allottees, their heirs or devisees, have received a vested property right in the minerals which is protected by the fifth amendment. The United States District Court for the District of Montana shall have jurisdiction to hear and determine the action and an appeal from its judgment may be taken as provided by law. If the court determines that the allottees, their heirs or devisees, have a vested interest in the minerals which is protected by the fifth amendment, or if the tribe does not commence an action as here authorized within two years from the date of this Act, the first section of this Act shall cease to have any force or effect, and the provisions of section 3 of the Act of June 3, 1926, as amended by the Acts of July 24, 1947, and September 21 [*sic*], 1961, shall thereupon be carried out as fully as if section 3 had not been amended by this Act."[27]

c. Decisions Below

Invoking jurisdiction based upon the litigation provision above, the Northern Cheyenne Tribe commenced suit in United States District Court for the District of Montana against the allottees, their heirs or devisees, as a class. The district court ruled that Congress did have the power to amend the 1926 Act, concluding that this enactment bestowed upon defendants no vested property right in the minerals which is protected by the Fifth Amendment.[28] On appeal, the Ninth Circuit Court of Appeals reversed. Relying upon *Choate v. Trapp*, 224 U.S. 665 (1912), and certain rules of construction, the court concluded that Congress lacked power to amend the Act.[29]

27. Pages A-6-7, *infra*.

28. Petition for Certiorari at A-12-29.

29. *Id.* at A-1-11.

SUMMARY OF ARGUMENT

a. The Northern Cheyenne Allotment Act of 1926 provided for allotment of surface lands only; it did not allot Reservation minerals—instead, minerals were to be allotted 50 years hence.

b. This meaning of the 1926 Act is established by the Act's plain terms, which provide that all Reservation minerals "are hereby reserved for the benefit of the tribe" and provide that at 50 years' end, the minerals shall "become" the property of the allottees.

c. The plain meaning of the 1926 Act is completely corroborated by the circumstances surrounding the Act's passage and its legislative history. The Act was shaped by the following circumstances or influences contemporaneous with its enactment: (1) the long-held view of federal officials that the Northern Cheyenne were unprepared for full-scale allotment; (2) the growing reluctance of these officials to continue on with the largely unsuccessful allotment policy; and (3) the tribal desire—as expressed in a 1925 tribal petition to Congress—that only surface lands be allotted. The result was a very limited allotment act—the last initial allotment act ever to be enacted by Congress.

d. Accordingly, the actual allotment patents likewise convey surface lands *only*. These patents contain an express reservation of all minerals for the benefit of the Tribe. This carves out "a distinct estate consisting of the minerals. . . . for the benefit of the Tribe, it is tribal land, and is unallotted." ***British-American Oil Producing Co. v. Board of Equalization***, 299 U.S. 159, 164-65 (1936), ***rehearing denied***, 299 U.S. 624 (1937).

e. A vast coal deposit underlies the *entire* Northern Cheyenne Reservation. However, through the mid-1960s, the deposit remained undeveloped. Thereafter, the energy crisis and a combination of economic and environmental factors made strip-mining development of the coal reserve commercially feasible. However, such development, without proper control, posed a grave threat to the Northern Cheyenne homeland and people. In 1968, after concluding that only the Northern Cheyenne people *as a whole* should control—and benefit from—coal development, Congress amended the 1926 Act to preserve in perpetuity the tribal ownership of all Reservation minerals.

f. In enacting the 1968 Amendment, Congress was exercising its plenary power over Indian affairs—specifically, in altering its 1926 plan for the future allotment of the tribal minerals. A line of decisions of this Court, commencing in 1912 with *Gritts v. Fisher*, 224 U.S. 640, through *United States v. Jim*, 409 U.S. 80 (1972), firmly establishes Congress' power to amend statutory allotment plans "as might become essential or appropriate in view of changing conditions, the welfare of the Indians and the public interests." *United States v. Chase*, 245 U.S. 89, 100 (1917).

g. Congress' 1968 Amendment was also in accordance with the express terms of the 1926 Act, which explicitly reserve to Congress the power to control and manage unallotted lands.

h. This 1968 Amendment was decidedly not in conflict with *Choate v. Trapp*, 224 U.S. 665 (1912)—because the 1926 Act was not founded on contract; the 1926 plan for mineral allotment was yet unconsummated; and, the beneficiaries of the 1968 Amendment were the Northern Cheyenne tribal members as a whole.

ARGUMENT

1. The Plain Language of the 1926 Act Clearly Indicates That All Reservation Minerals Be Withheld From Allotment, Retained in Tribal Ownership, and Made Subject To Continuing Congressional Control. This Is Confirmed By the Language of the Allotment Patents.

a. *The Language of the 1926 Act*

The portion of the 1926 Act devoted to Reservation minerals and natural deposits, section 3, states explicitly that the minerals were not being allotted:

> That the timber, coal or other minerals, including oil, gas and other natural deposits, on said reservation *are hereby reserved* for the benefit of the tribe. . . . [emphasis added][30]

Moreover, section 3 stipulates that the allottees would acquire no property interest in Reservation minerals and natural deposits until 1976:

> *Provided*, That at the expiration of fifty years from the date of the approval of this Act the coal or other minerals, including oil, gas, and other natural deposits, of said allotments shall *become* the property of the respective allottees or their heirs. . . . [emphasis added]

Without question, the provision directly above simply announces a congressional plan to make a *future* transfer of minerals and natural deposits; at the time of that transfer—*but not until then*—an allottee acquires a property interest in the minerals. Until then, however, the minerals

30. Section 4 of the 1926 Act also uses the term "reserved" to insulate certain lands from allotment. This section provides that lands devoted to school, agency, cemetery, religious, recreational, and town-site purposes were to be "reserved" by the Secretary and concludes with the following language:

> *In addition to reservations heretofore herein authorized* the Secretary of the Interior shall *withhold from allotment* [tracts containing sources of drinking water for livestock]. [emphasis added]

and natural deposits remain completely in tribal ownership. Therefore, under the authorities discussed in depth in section 2 of this brief, *infra*, Congress *as a matter of law* retained plenary authority, during the ensuing 50-year period, to alter its plan for the ultimate disposition of that tribal property, if "essential or appropriate in view of changing conditions, the welfare of the Indians and the public interests." *United States v. Chase*, 245 U.S. 89, 100 (1917). *Accord, Chase, Jr. v. United States*, 256 U.S. 1, 7-8 (1921); *Sweet v. Schock*, 245 U.S. 192, 195-96 (1917); *United States v. Rowell*, 243 U.S. 464, 468 (1917).

The Act's remaining provisions make it clear that where Congress intended to create presently vested rights under the Act, it used language of a present grant. Thus, section 1 declares tribal ownership of the executive order Reservation in the following terms:

> That the Northern Cheyenne Indian Reservation heretofore set apart by Executive order . . . for the permanent use and occupation of the Northern Cheyenne Indians, in Montana, be, and the same *is hereby, declared to be* the property of said Indians. . . . [emphasis added]

In similar fashion, section 2 makes a present grant to each allottee of the right to select for allotment the lands he then occupied:

> The right *is hereby reserved* to any Indian to select as his allotment a tract occupied by him at the time of the approval of this Act. . . . [emphasis added]

Likewise, section 4 makes a present grant to the county of a power to designate easements for public highways:

> An area not exceeding sixty feet on either side of every section line within the said reservation *is hereby dedicated* as public highways whenever and so far as the same may be so declared by the county commissioners . . . and all allotments and patents hereby authorized shall be subject to the *easements hereby created*. [emphasis added]

That Congress intended to withhold minerals and natural deposits from allotment and retain them in tribal ownership is further verified by the provisions dealing with leasing and disposition of income of Reservation minerals and natural deposits. Section 3 vests exclusive leasing authority in the tribal council; section 4 provides that the income "shall be deposited in the Treasury of the United States to the credit of the Northern Cheyenne Indians and be subject to expenditure for their benefit in such manner as Congress may direct."[31]

Furthermore, twice within the Act—in sections 1 and 3—Congress explicitly declared its continuing plenary power over the lands withheld from allotment. Though these declarations of continuing power were not legally required to establish or preserve that power,[32] they indicate with certainty that Congress did not intend that individual rights fasten on the lands, minerals and natural deposits withheld from allotment. Indeed, the statement of reserved power in section 3 immediately follows, and clearly qualifies, the provision announcing the plan to transfer the minerals and natural deposits 50 years hence.[33] This portion of section 3 states:

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31. The legislative history shows that Congress specifically rejected per capita distribution of that income. *See* section 4c, *infra*.

32. *See* section 2a, *infra*.

33. The court below in fact conceded that under the 1926 Act "it is technically correct that the reservation to the tribe severs the minerals from the allotted lands, making them part of the unallotted tribal property, and thereby confers upon Congress the power to change the beneficiaries of such tribal lands." Petition for Certiorari at A-7 (footnote omitted). Despite this holding, the Ninth Circuit rejected the literal terms of

> That the timber, coal or other minerals . . . on said reservation are hereby reserved for the benefit of the tribe . . . *Provided*, That at the expiration of fifty years from the date of the approval of this Act the coal or other minerals . . . of said allotments shall become the property of the respective allottees or their heirs: *Provided further*, That the unallotted lands of said tribe shall be held in common, *subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians.* [emphasis added]

b. *The Language of the Allotment Patents*

It is also significant to note that the Act's plain meaning was thoroughly corroborated by the contemporaneous administrative construction of the Act. The trust patents by which allotments were consummated explicitly withheld minerals and natural deposits from allotment:

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the 1926 Act, relying instead on the constructional rule that "statutes passed for the benefit of the Indians are to be liberally construed and all doubts are to be resolved in their favor." Petition for Certiorari at A-8 (footnote omitted).

In applying this rule of construction, the court below cited decisions of this Court (*Squire v. Capoeman*, 351 U.S. 1 (1956), *Carpenter v. Shaw*, 280 U.S. 363 (1930), and *Choate v. Trapp*, 224 U.S. 665 (1912)); all of these decisions dealt with state and federal (*i.e., non-Indian*) attempts to tax allotments acquired by treaty or agreement. Within that particular context, this Court has held that the terms of applicable treaties, agreements, or statutes must be liberally construed in favor of the Indian allottees. However, it is improper to hold that these Supreme Court decisions require that the allottees be preferred over the tribe in the case at hand. Unlike the cases *Squire*, *Carpenter*, and *Choate* relied on by the Ninth Circuit, the case at hand does not involve an attempt by a non-Indian party, the government, to profit from encroachment upon an individual Indian's property rights. Rather, the instant case involves a conflict between two groups *both* of which contain Indians. Therefore, since it is not possible to favor either side under the rule (without disfavoring the other), the rule is inapplicable. To employ this rule of construction as did the court below defies logic and is indefensible. (In fact, since the respondent class includes a substantial number of nonmember Indians and whites (*see notes* 6 & 7, *supra*), if any rule of preference is to be applied, it should be "the settled rule that as between the whites and the Indians the laws are to be construed most favorably to the latter." *Cherokee Intermarriage Cases*, 203 U.S. 76, 94 (1906).)

> NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, has allotted, and by these presents does allot, unto the said Indian the above-described land as a Homestead, subject to all the provisions, conditions, limitations and restrictions contained in said Act of June 3, 1926. . . . *There is also reserved for the benefit of the Northern Cheyenne Indians, all the coal or other minerals, including oil, gas, and all natural deposits in said land.* [emphasis added][34]

This construction of the Act's meaning by the General Land Office, the agency responsible for executing the Act's terms, is entitled to substantial weight:

> While not conclusive, this construction given to the [allotment] act in the course of its actual execution is entitled to great respect and ought not to be overruled without cogent and persuasive reasons. *United States v. Moore*, 95 U.S. 760, 763; *Hastings & Dakota R.R. v. Whitney*, 132 U.S. 357, 366; *United States v. Hammers*, 221 U.S. 220, 225, 228; *Logan v. Davis*, 233 U.S. 613, 627.

LaRoque v. United States, 239 U.S. 62, 64 (1915).

To the same effect is *United States v. Jackson*, 280 U.S. 183, 193 (1930), which also deals with the construction of an allotment act:

> It is a familiar rule of statutory construction that great weight is properly to be given to the construction consistently given to a statute by the Executive Department charged with its administration. *United States v. Cerecedo Hermanos y Compania*, 209 U.S. 337; *Robertson v. Downing*, 127 U.S. 607; *United States v. Healey*, 160 U.S. 136; and such construction is not to be overturned unless clearly wrong, or unless a different construction is plainly required. *United States v. Johnston*, 124 U.S. 236, 253; *Hawley v. Diller*, 178 U.S. 476, 488.[35]

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34. Appendix at A-45-46.

35. 280 U.S. at 193. *See Udall v. Tallman*, 380 U.S. 1, 16 (1965).

Thus, in *Assiniboine & Sioux Tribes v. Nordwick*, 378 F.2d 426 (9th Cir. 1967), *cert. denied*, 389 U.S. 1046 (1968), the Ninth Circuit construed a 1927 allotment act by relying principally on the "virtually unbroken administrative practice" of not reserving oil and gas to the tribe in homestead patents:

> This practice seemingly reflects a uniform contemporaneous interpretation of the 1927 Act by persons presumably familiar with its background and purpose, and we are persuaded by it.[36]

Moreover, this Court's decision in *British-American Oil Producing Co. v. Board of Equalization*, 299 U.S. 159 (1936), *rehearing denied*, 299 U.S. 624 (1937), requires the conclusion that the minerals and natural deposits remained unallotted. *British-American* dealt with allotments under a 1919 amendment[37] to the Blackfeet Allotment Act of 1907.[38] This 1919 amendment (providing for further allotment of reservation lands) declared that all minerals in or under the lands to be allotted "are hereby reserved for the benefit of the Blackfeet Tribe." Subsequently, allotments under the 1919 amendment were consummated by the issuance of trust patents which explicitly reserved all minerals for the benefit of the Tribe. This Court held in part:

> The issuance of the trust patents containing, as the statute requires, a reservation for the benefit of the tribe of all minerals, including oil and gas, in or under the allotted land, operates to carve out of such land and create a distinct estate consisting of the minerals. This estate is in itself land, and, being reserved for the benefit of the tribe, it is tribal land, and is unallotted.[39]

36. 378 F.2d at 432.

37. Act of June 30, 1919, 41 Stat. 3, 16.

38. Act of March 1, 1907, 34 Stat. 1015, 1035.

39. 299 U.S. at 164-65.

Introduction to Section 2: Congress' Plenary Power Over the American Indian

Congress has long exercised power over the American Indian. Moreover, throughout the past nearly 200 years, the plenary nature of this power has become an axiom of congressional Indian legislation. To a large extent the federal plenary power over Indians emanates from the Constitution.[40] Yet, in addition, the courts have long recognized that this power implicitly flows from the "guardianship" exercised by the United States over the Indian. *Hallowell v. United States*, 221 U.S. 317, 324 (1911); *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 418 (1866). This "guardian-ward" source of such plenary power is based upon the relative weakness and dependency of Indian tribes vis-a-vis the federal government.[41] Hence, from this relative weakness and dependency there flows "the duty of the United States to protect its wards, the Indians, and the consequent broad extent of its power over them and their affairs." *United States v. Jackson*, 280 U.S. 183, 190 (1930).

The plenary power of Congress over Indians and their affairs logically enough encompasses plenary power over tribal property. As this Court itself has stated: "It is thor-

40. Most significantly, Article I, section 8, clause 3 grants Congress the power "[t]o regulate Commerce . . . with the Indian Tribes." In one of the first important Indian cases in this country, Chief Justice Marshall himself recognized that the Constitution "confers on Congress the powers of war and peace; of making treaties, and of regulating commerce . . . with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. . . ." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

41. *See, e.g., United States v. Kagama*, 118 U.S. 375, 383-84 (1886). *See generally* Chambers, *Judical Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975).

oughly established that Congress has plenary authority over the Indians and all their tribal relations, and full power to legislate concerning their tribal property." *Winton v. Amos*, 255 U.S. 373, 391 (1921). More specifically, this Court has decidedly recognized Congress' power to mandate the distribution of tribal property, including the allotment of such property to tribal members. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *Stephens v. Cherokee Nation*, 174 U.S. 445 (1899). Congress' plenary power over Indian property also encompasses "authority to adopt measures to make the tribal property productive, and secure therefrom an income for the benefit of the tribe." *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 307 (1902).

In light of such authority, Congress enacted the Northern Cheyenne Allotment Act of 1926.[42] Consistent with *Lone Wolf* and *Stephens*, Congress distributed surface lands to individual allottees;[43] consistent with *Cherokee Nation*, Congress retained minerals within the control of the Tribe, to be alloted 50 years hence.[44] Congress' subsequent 1968 amending of the Act altered this latter provision, continuing the tribal control of minerals in perpetuity.[45] That Congress' plenary power over tribal property includes such power to alter shall now be addressed.

2. Congress Retains Continuing Power To Alter Its Statutory Plans For the Distribution of Tribal Property To Tribal Members. It Was Under This Power That Congress Enacted the 1968 Amendment.

As established above, Congress possesses plenary power to enact plans for the allotment or distribution of tribal

42. Act of June 3, 1926, 44 Stat. 690.
43. *Id.* (at section 2.)
44. *Id.* (at section 3.)
45. Act of July 24, 1968, 82 Stat. 424.

property to tribal members. The issue in the instant case concerns the power of Congress to subsequently *alter* such a plan. This issue has been dealt with in a line of decisions of this Court, commencing in 1912 with *Gritts v. Fisher*, 224 U.S. 640, through the 1972 decision *United States v. Jim*, 409 U.S. 80. As shall be demonstrated, these authorities establish that the 1968 Amendment to the 1926 Northern Cheyenne Allotment Act was a proper exercise of this plenary congressional power.

Gritts v. Fisher involved the Cherokee Allotment Act of 1902.[46] This act provided for a complete dissolution of both tribal property and government. An initial allotment of tribal lands was to be made; subsequently, the tribal government was to be terminated and all remaining tribal funds were to be distributed to the original allottees. The 1902 act explicitly defined the class of persons eligible to participate in the initial allotments and the final distributions; moreover, all persons outside the class were specifically barred from sharing in those distributions. However, Congress in 1906 amended the act, significantly expanding the class of persons eligible for allotment and future distribution. Members of the original class of allottees brought suit, claiming that the 1906 amendment unconstitutionally impaired a vested property right to receive final distribution of all lands and funds not otherwise distributed under the 1902 act. This claim was denied by the Court on the ground that Congress retained plenary authority to alter its statutory plan for that final distribution:

> [I]t is said that the act of 1902 contemplated that [the original allottees] alone should receive allotments and be the participants in the distribution of

46. Act of July 1, 1902, 32 Stat. 716.

> the remaining lands, and also of the funds, of the tribe. No doubt such was the purport of the act. But that, in our opinion, did not confer upon them any vested right such as would disable Congress from thereafter making provision for admitting newly born members of the tribe to the allotment and distribution. The difficulty with appellants' contention is that it treats the act of 1902 as a contract, when "it is only an act of Congress and can have no greater effect." *Cherokee Intermarriage Cases*, 203 U.S. 76, 93. It was but an exertion of the administrative control of the Government over the tribal property of tribal Indians, and was subject to change by Congress at any time before it was carried into effect and while the tribal relations continued. *Stephens v. Cherokee Nation*, 174 U.S. 445, 488; *Cherokee Nation v. Hitchcock*, 187 U.S. 294; *Wallace v. Adams*, 204 U.S. 415, 423.[47]

In 1914 this Court decided *Sizemore v. Brady*, 235 U.S. 441, dealing with a congressional amendment of the Creek Allotment Act of 1901.[48] The 1901 act provided that allotments of tribal land be made to all Creeks living on April 1, 1899. A certain tribal member qualified for allotment under this standard; however, he died before an allotment could actually be made to him. Under such circumstances, the 1901 act provided that the allotment be made to his heirs under Creek law. However, before allotment could be made to these heirs, Congress amended the 1901 act to provide that the allotment be made to the heirs under Arkansas law. The heirs under Creek law brought suit, claiming that it was beyond Congress' constitutional power to divest them of their right, under the 1901 act, to the allotment. This Court denied this claim on the ground that Congress retained continuing power to amend its statutory allotment plan for the Creeks:

47. 224 U.S. at 648.

48. Act of March 1, 1901, 31 Stat. 861.

> The lands and funds . . . were tribal property and only as [the allotment and distribution were] carried into effect were individual claims to be fastened upon them. Unless and until that was done Congress possessed plenary power to deal with them as tribal property. It could revoke the agreement and abandon the purpose to distribute them in severality, or adopt another mode of distribution, or pursue any other course which to it seemed better for the Indians. . . . In short, the power of Congress was not exhausted or restrained by the adoption of the original agreement, but remained the same thereafter as before, save that rights created by carrying the agreement into effect could not be divested or impaired. *Choate v. Trapp*, 224 U.S. 665, 671.[49]

The principle of *Gritts v. Fisher* and *Sizemore v. Brady* was expressly applied by this Court in *United States v. Rowell*, 243 U.S. 464 (1917). *Rowell* involved the congressional enactment of a statute directing allotment of a specified tract to a tribal member. Prior to the issuance of the allotment patent, Congress discovered that the tract was far more valuable than had been originally believed; thus, the allotment act was repealed. This Court held that the repeal invaded no vested property rights. This holding was based on the following analysis:

> Congress was here concerned with the affairs of Indians whose tribal relation had not been dissovled—Indians who were still wards of the United States and entitled to look to it for protection. The plan of giving them individual allotments. . . . was obligatory on them, because it was adopted by Congress in the exercise of its control over them. . . . And Congress was free to exert this guardianship in any manner which it deemed appropriate, and to adjust its actions to new or changing conditions, so long as no fundamental right was violated.

49. 235 U.S. at 449-50.

> . . . And if, before that direction [to issue an allotment patent] was complied with, it was discovered that the land designated was lawfully devoted to a special use from which it could not be withdrawn with due regard for the tribe in general, or that its situation and value was such that to alter or to convey it to [Rowell] would invest [Rowell] with much more than a fair distributive share of the common property of the tribe, we think it was equally admissable for Congress to recall that direction in the interest of the tribe as a whole. At most that direction was but an exertion of the administrative control of the government over the tribal property of tribal Indians, and was subject to change by Congress at any time before it was carried into effect. [footnote omitted][50]

In 1917 and 1920, respectively, this Court decided *United States v. Chase*, 245 U.S. 89, and *Nadeau v. Union Pacific R.R.*, 253 U.S. 442. Both cases sustained congressional action which altered prior schemes, established by treaty, for the distribution of tribal lands to members. *Chase* involved an 1865 treaty with the Omaha Tribe [51] which provided for assignments of tribal lands "for the exclusive use and benefit of [individual tribal members], their heirs and descendants. . . ."[52] In 1870 Chase received a certificate evidencing such an assignment. In 1882, however, Congress enacted a comprehensive allotment scheme which extinguished all rights under the treaty assignments.[53] Congress' action was upheld on the basis of the following analysis:

> Thus it is apparent . . . what was accomplished by the assignments under [the treaty] was merely a distribution or apportionment of the tribal right of occupancy, leaving the fee in the United States and leaving the United States and the tribe free to take such measures for the ultimate and permanent disposal of the lands, including the fee, as might become essential or appropriate in view of changing conditions, the welfare of the Indians and the public interests.[54]

50. 243 U.S. at 468-69.
51. Treaty with the Omaha Indians of Mar. 6, 1865, 14 Stat. 667.
52. 245 U.S. at 93.
53. Act of August 7, 1882, 22 Stat. 341.

Nadeau v. Union Pacific R.R. involved an 1861 treaty which provided for the allotment of tribal lands.[55] However, in 1862 Congress enacted a statute which made possible a railroad right-of-way through the reservation.[56] Thereafter, in 1863, actual allotment under the treaty provisions commenced. This Court held that allotments under the 1861 treaty were subject to the right-of-way granted by the 1862 statute. This holding was based upon the following analysis:

> It seems plain that, at least, until actually allotted in severalty . . . the lands were but part of the domain held by the Tribe under the ordinary Indian claim—the right of possession and occupancy—with fee in the United States. *Beecher v. Wetherby*, 95 U.S. 517, 525. The power of Congress, as guardian for the Indians, to legislate in respect of such lands is settled. *Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U.S. 641, 653; *United States v. Rowell*, 243 U.S. 464, 468; *United States v. Chase*, 245 U.S. 89.
>
> The grant of the right of way in 1862, was present and absolute and, upon identification of the route took effect as of the date of the act. All who thereafter acquired public lands took subject to such granted right. *Railroad Company v. Baldwin*, 103 U.S. 426, 430. Although parties to the Treaty of 1861 contemplated future allotments, it made none. No individual title to any portion of the land arose until allotted, and none was allotted until after 1862.[57]

In 1921, the holding in *United States v. Chase, supra*, was

54. 245 U.S. at 99-100.
55. Treaty with the Pottawatomies of Nov. 15, 1861, 12 Stat. 1191.
56. Act of July 1, 1862, 12 Stat. 489.
57. 253 U.S. at 445-46.

extended one step further by *Chase, Jr. v. United States,* 256 U.S. 1 (1921). *Chase, Jr.* also involved Omaha allotments; it considered whether Congress could lawfully extinguish allotment rights under the above-described 1882 statute and an 1893 amendment.[58] This issue arose as a result of Congress' 1912 enactment of a statute[59] which repealed the 1882 and 1893 allotment legislation. Hiram Chase, Jr. contended that the 1912 statute could not lawfully divest him of rights to allotment which had accrued under the 1882 and 1893 acts. This Court denied Chase, Jr.'s claim in the following terms:

> The contention is one that has often been made in this Court and rejected as often as made. *Gritts v. Fisher,* 224 U.S. 640; *Choate v. Trapp,* 224 U.S. 665; *Cherokee Nation v. Hitchcock,* 187 U.S. 294. In those cases the relation of the individual Indian to the tribal property is explained and also the power of Congress over that property and the tribes. In the recent case of *United States v. Chase,* 245 U.S. 89, we had occasion to consider the Reservation here involved and the effect of Article IV of the treaty of 1865 relied on by the appellant, and decided that its purpose was to do no "more than to individualize the existing tribal right of occupancy" and that it left "the fee in the United States" and left "the United States and the tribe free to take such measures for the ultimate and permanent disposal of the lands, including the fee, as might become essential or appropriate in view of changing conditions, the welfare of the Indians, and the public interests."
>
> The case dealt with assignments under Article IV, but its principle necessarily applies to a mere right under the Act of 1882.[60]

58. Act of March 3, 1893, 27 Stat. 612, 630.

59. Act of May 11, 1912, 37 Stat. 111.

60. 256 U.S. at 7-8.

In 1939, the above principles were applied to *Chippewa Indians v. United States,* 307 U.S. 1, a case strongly analogous to the case at hand. *Chippewa Indians* involved a damage suit brought on behalf of a class of Chippewas.[61] The class consisted of all those Chippewas who were to share in the final distribution of a permanent fund. This fund was created in 1889 when Congress enacted a comprehensive act dealing with the affairs of the Chippewas.[62] Explicitly, the fund was to consist of proceeds from the sale of tribal lands and timber. In addition, section 7 of the 1889 act provided that the fund be held for 50 years and then distributed in equal shares to the members of the class—the class consisting of all Chippewas and their issue living at the expiration of the 50-year period. The act further provided that during this 50-year period, Congress could only make very limited expenditures from the fund; no more than five per cent could be spent for "civilization and self-support."[63] Plaintiffs contended that subsequent acts of Congress, authorizing expenditures from the permanent fund substantially in excess of those permitted by the 1889 act, invaded the remaindermen's vested rights to distribution of the principal at the end of the 50-year period.[64]

61. The suit was brought under a special jurisdictional act (Act of May 14, 1926, 44 Stat. 555, as amended by the Act of April 11, 1928, 45 Stat. 423, and the Act of June 18, 1934, 48 Stat. 979) which provided that the plaintiffs "shall be considered to share in the final distribution of the permanent fund provided for by section 7 of the Act of January 14, 1889 (25 Stat. L. 642)...."

62. Act of January 14, 1889, 25 Stat. 642.

63. *Id.* at 645. The interest earned by the fund was, however, to be fully expended during the 50-year period for the benefit of the Indians. 25 Stat. 642, 645.

64. These subsequently authorized expenditures are detailed throughout the Court of Claims' opinion. *Chippewa Indians v. United States,* 88 Ct.Cl. 1 (1938).

> The appellants assert that, by the Act of 1889, Congress abdicated its plenary power of administration of the Chippewas' property as tribal property . . . and agreed to hold the proceeds of the ceded lands in strict and conventional trust for classes of individual Indians in accordance with the program outlined in the Act.
>
> In this view the living Chippewas are beneficiaries of the income of the fund during the fifty year period, and individual Chippewa Indians who may be living at the expiration of the period, as a class, are remaindermen.[65]

The above claim was denied by this Court in the following terms:

> [The 1889] Act contemplates future dealings with the Indians upon a tribal basis. It exhibits a purpose gradually to emancipate the Indians and to bring about a status comparable to that of citizens of the United States. But it is plain that, in the interim, Congress did not intend to surrender its guardianship over the Indians or treat them otherwise than as tribal Indians.
>
> . . . Moreover, an examination of the Act of 1889 discloses that it is not cast in the form of an agreement; and, we may not assume that Congress abandoned its guardianship of the tribe or the bands and entered into a formal trust agreement with the Indians, in the absence of a clear expression of that intent.
>
> . . . .
>
> We hold that the Act did not tie the hands of Congress so that it could not depart from the plan envisaged therein, in the use of tribal property for the benefit of its Indian wards.[66]

Most recently, in 1972, this Court decided yet another case strongly analogous to the case at hand—namely, *United States v. Jim*, 409 U.S. 80. The *Jim* facts were as follows:

65. 307 U.S. at 3.

66. 307 U.S. at 4-5.

lows: in 1933 Congress provided for the annexing to the Navajo Indian Reservation of two separate tracts in San Juan County, Utah, known collectively as the Aneth Extension.[67] Inhabiting the isolated Aneth Extension—as it had for generations—was a distinct group of primitive Navajo and Piute sheepherders.[68] The Navajo Tribe had sought annexation of the tracts for grazing purposes only; the Tribe was not specifically interested in oil deposits that might be located on the tracts, as it believed that no viable reserves existed.[69]

Explicitly, the 1933 annexing act provided that the annexed lands were to be set aside specifically for the benefit of the Indians then resident thereon (the group of Navajo and Piute sheepherders) and any other Indians that the Secretary of the Interior might see fit to locate there. Moreover, the act prohibited any Indian homesteading or future allotment of lands within San Juan County, the county containing the Aneth Extension. Finally, the act provided that should oil and/or gas be developed, 37½ per cent of the net royalties were to be expended for the benefit of the Indian residents of the Extension. Subsequently, oil was developed in lucrative quantities.[70]

Through 1968 the Secretary of the Interior had not located any additional Indians on the Aneth Extension,[71] and the Indian residents thereon continued to consist of that

67. Act of March 1, 1933, 47 Stat. 1418.

68. 409 U.S. at 86; unreported District Court findings of fact; finding no. 12.

69. S. Doc. No. 64, 72d Cong., 1st Sess. 39-40, and, in general 38-44, 57-58, 77, 118 (1933).

70. By 1970, over $7,000,000 in royalties were owing to the Aneth residents. 409 U.S. at 84; Appellees, Motion To Affirm and Brief In Support Thereof at 5.

71. Unreported District Court findings of fact; finding no. 10.

distinct group of Navajo and Piute sheepherders and their descendants, numbering approximately 1,500.[72] However, in 1968, Congress amended the 1933 act to provide that the 37½ per cent net royalties be expended for the benefit of *all* Navajo Indians residing in San Juan County.[73] This amendment had the following effects: it expanded the size of the class of beneficiaries from 1,500 to 15,000 persons[74] and it excluded the Piutes from the class of beneficiaries.[75]

The Aneth Extension residents attacked the 1968 amendment on the ground that it deprived them of a vested right, under the 1933 act, in 37½ per cent of the net royalties. Their claim was denied by this Court, per curiam, in the following terms:

> Congress in 1933 did not create constitutionally protected property rights in the [Aneth Extension community]. The Aneth Extension was added to a tribal reservation, and the leases which give rise to mineral royalties are tribal leases. It is settled that "[w]hatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members." *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 307; *Delaware Indians v. Cherokee Nation*, 193 U.S. 127, 136. To be sure, the 1933 Act established a pattern of distribution which benefited the [Aneth community] more than any other Indians on the Navajo Reservation. But it was well within the power of Congress to alter that distributional scheme. [footnotes omitted][76]

This Court then went on to indicate its reliance on *Gritts v. Fisher, supra,* and stated in conclusion:

> Congress has not deprived the Navajo of the benefits of mineral deposits on their tribal lands. It has merely chosen to re-allocate the 37½% of royalties which flow through the State in a more efficient and equitable manner. This was well within the power of Congress to do. As no "property," in a Fifth Amendment sense, was conferred upon residents of the Aneth Extension by the 1933 Act, no violation of the Fifth Amendment was effected by the 1968 legislation.[77]

72. Unreported District Court findings of fact; finding nos. 1, 12; 409 U.S. at 84.

73. Act of May 17, 1968, 82 Stat. 121.

74. Appellees' Motion To Affirm and Brief In Support Thereof at 8.

75. Unreported District Court findings of fact; finding no. 18.

76. 409 U.S. at 82.

77. *Id.* at 83. The general principle relied on above has also been applied by the U.S. Court of Claims in the following two recent cases: *Klamath and Modoc Tribes v. United States,* 436 F.2d 1008 (Ct. Cl. 1971), *cert. denied sub nom.*, 404 U.S. 950 (1971); and *Fort Peck Indians v. United States,* 132 F.Supp. 222, 132 Ct. Cl. 373 (1955).

Klamath and Modoc Tribes involved the Klamath Termination Act of 1954 (Act of August 13, 1954, 68 Stat. 718) which permitted a tribal member to withdraw from the tribe and have his interest in tribal property commuted to money and paid to him no later than a specified date (section 6(b)). Subsequently, however, Congress amended the act to postpone that date; Congress also imposed additional burdens on the manner in which the tribal assets were to be sold to satisfy the claims of withdrawing members. A class of withdrawing members brought suit, alleging that the postponement of the distribution and the imposition of additional burdens on the process deprived them of individual vested property rights which were secured to them by the 1954 act. This claim was denied in the following terms:

> These parties contend that the passage of the 1954 Act gave the withdrawing tribal members vested property interests not subject to later Congressional modification or defeasance, and that the failure of Congress to follow through on the initial 1954 plan constituted such a gross interference with these firm rights of the withdrawing Indians as to constitute a taking.
>
> . . . .
>
> We would, in any event, be loath to adopt the argument that the mere passage of the original Termination Act gave the Anderson plaintiffs immutable rights. That rule would in effect freeze Congress into a position once taken and deny it the right to accomodate its Indian enactments, within a short time, to changed circumstances . . . . Courts should not look with squinty eyes at such bona fide modification of Indian legislation to fit changed or newfound circumstances, especially where it is obvious, as in this instance, that the whole matter is still in flux and that individual rights have not yet become firm or settled in any realistic sense.

436 F.2d at 1021.

Another recent case, *Fort Peck Indians*, involved a congressional alteration of the Fort Peck Allotment Act of 1908 (Act of May 30, 1908, 35 Stat. 558). The 1908 act provided for the sale of surplus tribal lands at appraised values, under specified terms of payment (sections 4-11). The proceeds of those sales, less expenses, were to be "allotted in severalty to the members of the tribe" at a specified date (section 15). Lands were

The above-discussed principle of congressional power to alter has not been confined to narrow application; to the contrary, the principle has been applied to sustain a variety of congressional alterations to prior allotment acts. For example, against Fifth Amendment attack this Court has upheld revisions to allotment legislation having the effect of extinguishing prior statutory eligibility for allotment. In *Stephens v. Cherokee Nation,* 174 U.S. 445 (1899), the original allotment act[78] provided that a commission would establish the roll of tribal members entitled to allotments; persons aggrieved by a decision of that commission might appeal to the United States District Court and "the judgment of the court shall be final." Pursuant to this statute, the United States District Court made final determinations of allotment eligibility. Subsequently, Congress amended the original allotment act to permit further judicial review in the Supreme Court of these determinations, which previously had been branded as final under the original act.[79] It was contended that this amendment invaded vested rights to allotment which had previously accrued under the original act. This claim was rejected in the following terms:

> [N]or can the act be properly regarded as destroying any vested right, since the right asserted to be vested is only the exemption of these judgments from review,

accordingly appraised and sold. However, subsequently, in accordance with congressional authorization (Act of June 6, 1912, 37 Stat. 125, 43 U.S.C. §1196 (1970)), the Secretary of the Interior reduced the sale prices of certain of these surplus lands; also, he permitted the purchasers to defer payment of the purchase price. The Court of Claims sustained these deviations from the terms of the 1908 act on the ground that "notwithstanding the terms of this Act, Congress retained plenary power to deal with the Indian lands in such a manner as it thinks is for the benefit of the Indians." 132 F.Supp. at 223.

78. Act of June 10, 1896, 29 Stat. 321.

79. Act of July 1, 1898, 30 Stat. 571, 591.

> and the mere expectation of a share in the public lands and moneys of these tribes . . . cannot be held to amount to such an absolute right of property. . . .[80]

Wallace v. Adams, 204 U.S. 415 (1907), upheld on this reasoning a further amendment[81] to the allotment act involved in *Stephens,* establishing yet another mechanism for nullifying prior determinations of eligibility for allotment which had been termed "final" under the original version of the allotment act. *See also Lowe v. Fisher,* 223 U.S. 95 (1912).

Additionally, there is a very substantial line of decisions of this Court enforcing allotment act amendments extending or reimposing restrictions on the allottee's ability to alienate his allotment. *Tiger v. Western Investment Co.,* 221 U.S. 286 (1911) (extension sustained against Fifth Amendment attack); *Heckman v. United States,* 224 U.S. 413 (1912) (extension sustained following *Tiger*); *Goat v. United States,* 224 U.S. 458 (1912) (extension enforced); *United States v. Bartlett,* 235 U.S. 72 (1914) (reimposition enforced); *Brader v. James,* 246 U.S. 88 (1918) (reimposition sustained against Fifth Amendment attack); *United States v. Jackson,* 280 U.S. 183 (1930) (extension sustained against Fifth Amendment attack).[82]

Sweet v. Schock, 245 U.S. 192 (1917) is another decision of this Court sustaining, against Fifth Amendment attack, a subsequent congressional divestment of privileges provided under a prior allotment act. The allottee received

80. 174 U.S. at 478.

81. Act of July 1, 1902, 32 Stat. 641.

82. *See also Williams v. Johnson,* 239 U.S. 414 (1915), which sustained the cutting short of a restriction against Fifth Amendment attack.

an allotment which, under the applicable allotment act[83] and under the terms of the allotment patent issued, was immune from taxation for 21 years. Subsequently, Congress enacted a series of statutes[84] which granted a limited right to alienate the allotment, but exacted in return for the exercise of that right an extinguishment of the tax immunity. This Court upheld that extinguishment of the tax immunity against Fifth Amendment attack, declaring it a permissible part of Congress' necessary "[a]ccommodation to new conditions. . . ."[85]

The general legal principle upon which the foregoing decisions rest was well articulated in a 1937 opinion of the Solicitor of the Department of the Interior, *The Constitutional Power of Congress To Enact Legislation Concerning the Allotment of Lands to the Mission Indians of California.*[86] This opinion expressly dealt with the issue of whether "the individual members of the bands or villages of Mission Indians acquired vested rights by enactment of the [allotment] legislation sought to be repealed so that Congress could not thereafter recall or impair such rights without violating the due process clause of the Fifth Amendment to the Federal Constitution."[87] Citing *Gritts v. Fisher*, 224 U.S. 640 (1912), *Sizemore v. Brady*, 235 U.S. 441 (1914), and *Chase, Jr. v. United States*, 256 U.S. 1 (1921), the Solicitor concluded:

> The foregoing decisions clearly establish that acts of Congress looking to the allotment in severalty of such

83. Act of March 1, 1901, 31 Stat. 861, and Act of June 30, 1902, 32 Stat. 500.

84. Act of March 3, 1903, 32 Stat. 982, 996; Act of April 26, 1906, 34 Stat. 137; Act of May 27, 1908, 35 Stat. 312.

85. 245 U.S. at 195.

86. 56 I.D. 102.

87. *Id.*

> lands do not, of their own force, create any vested right in any individual Indian. Until such acts of Congress have been carried into effect to the extent of creating vested property rights in the individual Indians, the reservation lands remain in tribal ownership subject to the undisputed power of Congress to deal with them as such.[88]

a. *While the 1926 Act (§§ 1 & 3) Contains Express Reservations of Congress' Power To Amend That Statutory Allotment Plan, Such Reservations Were Not Legally Required.*

The court below held that in order for Congress to preserve its power to amend the 1926 Act, "a clear expression of Congress' retained power" must be included in the Act.[89] No cases were cited for that proposition. Moreover, the court's holding was in conflict with decisions of this

88. *Id.* at 106. *See also Clark, Jr. v. Benally*, 51 I.D. 91 (1925), *aff'd on rehearing*, 51 I.D. 98 (1925); *Assiniboine and Sioux Tribes v. Nordwick*, 378 F.2d 426 (9th Cir. 1967), *cert. denied*, 389 U.S. 1046 (1968) (although Congress had provided for the allotment of lands, including the minerals thereunder, it could subsequently amend that act to reserve minerals from allotment); *Hopkins v. United States*, 414 F.2d 464 (9th Cir. 1969) and *Finch v. United States*, 387 F.2d 13 (10th Cir. 1967) (subsequent congressional emasculation of statutory provisions for public land allotments to Indians sustained).

89. The court below reasoned that in three other allotment acts, the Fort Belknap, Crow and Osage allotment acts, it was expressly stated therein that Congress retained the power to alter the allottee's expectancy in the minerals beneath his allotment. From this observation, the court made the following presumption: "The rather conspicuous omission of such language from a statute dealing with the same subject as those other allotment acts indicates that Congress intended to create rights in the Northern Cheyenne allottee different from those in the other allotment statutes." Petition for Certiorari at A-6-7.

However, careful analysis of these other allotment acts reveals: (1) they are generically different from the 1926 Act (*see* section 4d, *infra*); (2) the legislative histories of the Crow and Osage acts reveal that the express provisos were *not* viewed by Congress as essential to preserving the inherent congressional power to alter the allottee's expectancy in the minerals; and (3) neither the Fort Belknap, Crow nor Osage acts contain the all-encompassing statements of reserved power found in sections 1 and 3 of the Northern Cheyenne Act.

Court which establish that no reservation of power whatsoever is necessary.

Congress possesses plenary power to adjust enacted schemes for the allocation of tribal property "as might become essential or appropriate in view of changing conditions, the welfare of the Indians and the public interests." *United States v. Chase,* 245 U.S. 89, 100 (1917). *Accord, Chase, Jr. v. United States,* 256 U.S. 1, 7-8 (1921); *Sweet v. Schock,* 245 U.S. 192, 195-96 (1917); *United States v. Rowell,* 243 U.S. 464, 468 (1917). This power is fundamental, inherent in Congress' role as guardian of Indian people,[90] and not subject to relinquishment so long as that guardianship subsists. *United States v. Jackson,* 280 U.S. 183, 190 (1930).

That Congress need not specifically reserve an amendatory power in its statutory plans for the distribution of tribal property is clear from the following decisions of this Court. In each of them, an alteration of a statutory plan of distribution is sustained despite the *lack* of a specific reservation of power to alter. *United States v. Jim,* 409 U.S. 80 (1972); *United States v. Jackson, supra; Brader v. James,* 246 U.S. 88 (1918); *Sweet v. Schock, supra; Sizemore v. Brady,* 235 U.S. 441 (1914); *United States v. Bartlett,* 235 U.S. 72 (1914); *Gritts v. Fisher,* 224 U.S. 640 (1912); *Goat v. United States,* 224 U.S. 458 (1912); *Heckman v. United States,* 224 U.S. 413 (1912); *Lowe v. Fisher,* 223 U.S. 95 (1912); *Tiger v. Western Investment Co.,* 221 U.S. 286 (1911); *Wallace v. Adams,* 204 U.S. 415 (1907).

For example, in *Gritts v. Fisher* the original allotment

90. *See* note 41, *supra.*

act expressly barred children born after a specified date from a class of allottees, yet this Court sustained an amendment which expanded the class to include those previously excluded children.

Introduction to Section 3

While, as demonstrated above, Congress has plenary power to alter *executory* portions of statutory allotment plans, it is fully conceded that Congress may not strip away rights which have vested in tribal members through *consummated* allotments arising from contract. This Fifth Amendment limitation on congressional power arises from the case *Choate v. Trapp,* 224 U.S. 665 (1912), explicated below.

3. The 1968 Amendment Does Not Violate the Rule of *Choate v. Trapp*—That Congress May Not, Consistent With the Fifth Amendment, Deprive Tribal Members of Property Rights Which They Have Acquired Through the Consummation of Statutory Allotment Plans Founded on Contract.

The decision of the court below rests fundamentally on an interpretation of *Choate v. Trapp,* 224 U.S. 665 (1912). The Ninth Circuit interpreted the holding in *Choate* as completely insulating the Northern Cheyenne allottees' mineral expectancy, under the terms of the 1926 Act, from congressional alteration. Because of the preeminence of *Choate* in the Ninth Circuit's reasoning, this case will now be discussed in substantial depth.

a. *The Factual Background of* Choate v. Trapp

Choate involved the Choctaw and Chickasaw Tribes, two of the Five Civilized Tribes.[91] Through the early 1830s,

91. The Five Civilized Tribes consist of the Cherokee, Choctaw, Chickasaw, Creek and Seminole Tribes.

these tribes had occupied vast southern territories east of the Mississippi River.[92] During the 1830s, however, treaties were negotiated which provided for the removal of these tribes west of the Mississippi. These treaties made two basic guarantees to the Indians as to their new lands: (1) tribal titles were to be perpetual and in fee; and (2) no territorial or state governments were to be imposed upon the new territory.[93] This new territory, to be known as the "Indian Territory," initially consisted of all of the present state of Oklahoma, except the panhandle portion. Subsequently, because of their Civil War alliances with the Confederacy, the tribes were forced to relinquish the western half of the Territory—other Indian tribes were settled on a portion of this land, and the remainder of this land became the open Territory of Olkahoma. The Choctaws and Chickasaws, who were closely related, came to jointly own approximately 11,650,000 acres of the Indian Territory.[94]

A tide of white immigration into the Indian Territory commenced after the Civil War, and by 1890 the Indians constituted less than one-third of the population in the Territory.[95] The majority white population, to expedite white acquisition of the Indian lands, began intensively urging the federal government to abolish the tribal govern-

92. The Cherokees, Creeks, Choctaws and Chickasaws occupied twenty-five million acres in northeast Georgia, western North Carolina, south a Tennessee, eastern Alabama, and the northern two-thirds of Missi ppi. Young, *Indian Removal and Land Allotment: The Civilized Tribes and Jacksonian Justice*, LXIV AM. HISTORICAL REV. 33 (1958).

93. A. DEBO, AND STILL THE WATERS RUN—THE BETRAYAL OF THE FIVE CIVILIZED TRIBES 5 (1972 ed.). (And, *see generally*, G. FOREMAN, INDIAN REMOVAL—THE EMIGRATION OF THE FIVE CIVILIZED TRIBES OF INDIANS (1932).)

94. *Id.* at 6.

95. BUREAU OF THE CENSUS, EXTRA CENSUS BULLETIN, THE FIVE CIVILIZED TRIBES OF THE INDIAN TERRITORY 3-5 (1894).

ments and to transform the communal system of landholding into individual tenure. The whites' ultimate object was the creation of the State of Oklamoma.[96]

Congress responded with the Act of March 3, 1893,[97] creating the Commission to the Five Civilized Tribes (which became universally known as the Dawes Commission). The Commission's task was to negotiate with the tribes to obtain extinguishment, through cession or allotment, of all tribal title to lands within the Indian Territory, so as "to enable the ultimate creation of a State or States of the Union which shall embrace the lands within said Indian Territory."[98] The Indian nations adamantly resisted negotiation with the Commission.[99] Finally, however, in 1897 the Commission succeeded in reaching an agreement —the Atoka Agreement—with the Choctaw and Chickasaw.

The following year Congress approved that agreement with modifications, and provided that the modified Atoka Agreement would be effective if ratified at general tribal elections to be held by the Choctaw and Chickasaw.[100] After congressional and tribal ratification, the fully-ratified Atoka Agreement provided:

> That all the lands within the Indian territory belonging to the Choctaw and Chickasaw Indians shall be allotted to the members of said tribes. . . .
>
> . . . .
>
> All the lands allotted shall be non-taxable while the

96. A. DEBO, AND STILL THE WATERS RUN—THE BETRAYAL OF THE FIVE CIVILIZED TRIBES 19-23 (1972 ed.).

97. 27 Stat. 612, 645.

98. *Id.*

99. A. DEBO, AND STILL THE WATERS RUN—THE BETRAYAL OF THE FIVE CIVILIZED TRIBES 23-24, 27-30, 32-33 (1972 ed.)

100. Act of June 28, 1898, 30 Stat. 495, 505.

> title remains in the original allottee, but not to exceed twenty-one years from date of patent. . . .[101]

The Atoka Agreement further provided that upon completion of allotments, patents were to be delivered to the allottees:

> Said patents shall be framed in accordance with the provisions of this agreement . . . and the acceptance of his patents by such allottee shall be operative as an assent on his part to the allotment and conveyance of all the lands of the Choctaws and Chickasaws in accordance with the provisions of this agreement, and as a reliquishment of all his right, title, and interest in and to any and all parts thereof, except the land embraced in said patents. . . .[102]

b. *Particular Facts Giving Rise to Choate v. Trapp*

Carved from the Indian Territory, Oklahoma was admitted to the Union in 1907, with a constitution specifically disclaiming any right in the state to limit or impair the federally secured tax exemptions of Indians.[103] The white populace of Oklahoma, however, chafing at the restricted alienability of Indian lands and the lands' tax immunity, lobbied intensely for federal legislation which would ameliorate these concerns.[104]

This lobbying resulted in the Act of May 27, 1908[105] which made sweeping releases of restrictions on the alienability of allotted lands, and, declared the now-unrestricted lands to be subject to state taxation. Immediately, on the

101. 30 Stat. 495, 505, 507.

102. *Id.* at 507-08.

103. *Choate v. Trapp*, 224 U.S. 665, 670 (1912) (hereinafter cited as "224 U.S. at . . .").

104. A. DEBO, AND STILL THE WATERS RUN—THE BETRAYAL OF THE FIVE CIVILIZED TRIBES 126-58, 164-65, 168-80 (1972 ed.).

105. 35 Stat. 312.

authority of this act, Oklahoma commenced taxation of all unrestricted allotted lands. However, believing that they possessed a vested property right to the tax immunity, not subject to divestment by the federal government, Choctaw and Chickasaw allottees brought suit in state court to enjoin assessment of their lands.[106] The Oklahoma Supreme Court denied the Indian claims; however, this Court reversed.[107]

c. *The Decision of This Court in* Choate v. Trapp

Choate held that Congress' attempt to divest the allottees of the Atoka Agreement tax immunity, fully conveyed to the allottees by allotment patents, ran afoul of the Fifth Amendment. This holding was founded on the following analysis:

(1) The tax immunity had been secured to the allottees under agreement with the United States, fully ratified by the Indians and Congress,[108] in which the tribes parted with very substantial consideration,[109] and each allottee individually agreed that the acceptance of his allotment patent would be deemed an agreement by him to allotment of all tribal lands and a relinquishment by him of his entire equitable interest in substantially all of the common prop-

106. *Choate v. Trapp*, 28 Okla. 517, 114 Pac. 709 (1911). In addition, Creek allottees brought similar suit in *English v. Richardson*, 28 Okla. 408, 114 Pac. 710 (1911), and other Choctaw allottees in *Gleason v. Wood*, 28 Okla. 402, 114 Pac. 703 (1911).

107. This Court also reversed *English* and *Gleason* (*id.*) in very brief opinions holding that *Choate* was fully dispositive. *English v. Richardson*, 224 U.S. 680 (1912); *Gleason v. Wood*, 224 U.S. 679 (1912).

108. Act of June 28, 1898, 30 Stat. 495; Act of July 1, 1902, 32 Stat. 641.

109. The tribes relinquished their fee titles to millions of acres of land and thus expedited the creation of the State of Oklahoma. 224 U.S. at 667.

erty of the tribe, a relinquishment specifically desired by Congress.[110]

(2) At the time of the 1908 federal act divesting the tax immunity, substantially all of the allotment patents had been delivered to the allottees.[111]

> Upon delivery of the patent the agreement was *executed*, and the Indian was *thereby* vested with all the right conveyed by the patent, and, like a grantee in a deed poll, or a person accepting the benefit of a conveyance, bound by its terms. . . .[112]

This Court then reasoned:

> As the plaintiffs were offered the allotments on the conditions proposed; as they accepted the terms and, in the relinquishment of their claim, furnished a consideration which was sufficient to entitle them to enforce whatever rights were conferred, we are brought to a consideration of the question as to what those rights were.[113]

(3) The nature of the rights transferred through the issuance of the patent was the determined. This Court noted that the Atoka Agreement provided that all patents "shall be framed in accordance with the provisions of this agreement."[114] Accordingly, the patents "made a grant of land which should be non-taxable. . . .",[115] in addition, the patents issued under the agreement conveyed an exemption which is "attached to the land. . . ."[116]

The patent issued in pursuance of those statutes gave

110. 224 U.S. at 669, 671.

111. 224 U.S. at 670.

112. 224 U.S. at 672 (emphasis added).

113. *Id.*

114. 30 Stat. 507; 224 U.S. at 669, 672, 673.

115. 224 U.S. at 673.

116. 224 U.S. at 675-76.

> the Indian as good a title to the exemption as it did to the land itself. Under the provisions of the Fifth Amendment there was no more power to deprive him of the exemption than of any other right in the property. No statute would have been valid which reduced his fee to a life estate or attempted to take from him ten acres, or fifty acres, or the timber growing on the land.[117]

(4) Additionally, this Court in *Choate* relied heavily on the analysis of Chief Justice Marshall in *New Jersey v. Wilson*, 11 U.S. (7 Cranch) 164 (1812), which was identified as being "directly in point here and especially as to the quality of the exemption."[118]

Wilson is indeed very much in point. As does *Choate*, the *Wilson* case deals with the question of governmental power[119] to subsequently divest Indian lands[120] of a real property tax exemption secured to them under an executed agreement with the government. The Indians had claimed a considerable portion of the lands of New Jersey, and the colonial government desired to extinguish that claim. To that end, an agreement was negotiated between the Indians and the government, and confirmed by the legislature, providing for the government's purchase of a parcel of land for the Indians, which would thereafter be immune from taxation; in consideration, the Indians would release their claim to other lands in the state. This agreement was executed—lands were conveyed to the Indians and the Indians relinquished their claim to the other lands. Subsequently,

117. 224 U.S. at 673-74.

118. 224 U.S. at 676.

119. In this case, state power was at issue. Since the state does not possess the plenary power of guardianship over Indian affairs possessed by the federal government, its actions affecting Indian property rights would be judged more severely than comparable federal actions.

120. In this case, lands of the Delaware Tribe.

the state legislature passed an act purporting to extinguish the tax exemption. This Court struck down that act on the ground that it impaired protected contract rights of the Indians:

> Every requisite to the formation of a contract is found in the proceedings between the then colony of New Jersey and the Indians. The subject was a purchase on the part of the government of extensive claims of the Indians, the extinguishment of which would quiet the title to a large portion of the province. A proposition to this effect is made, the terms stipulated, the consideration agreed upon, which is a tract of land, with the privilege of exemption from taxation; and then, in consideration of the arrangement previously made, one of which this act of assembly is stated to be, the Indians executed their deed of cession. This is certainly a contract, clothed in the forms of unusual solemnity. The privilege, though for the benefit of the Indians, is annexed, by the terms which create it, to the land itself, not to their persons.[121]

Thus, the decision in *New Jersey v. Wilson*, as the decision in *Choate v. Trapp*, is premised on the existence of a contractual relationship between the Indians and the government, and the execution of that contract by conveyance of land and an appurtenant tax immunity.[122]

121. 11 U.S. (7 Cranch) at 166-67. Chief Justice Marshall's analysis was based additionally on a holding that the tax immunity was annexed to the land itself.

122. The *Choate* Court at 672 also cited the cases *Wisconsin & Michigan Ry. v. Powers*, 191 U.S. 379 (1903), *Home of the Friendless v. Rouse*, 75 U.S. (8 Wall.) 430 (1869), and *Tomlinson v. Jessup*, 82 U.S. (15 Wall.) 454 (1872) in connection with its analysis of the Atoka Agreement. The above cases all deal with claims by corporations that tax immunities arising from a statutorily-established contractual relationship with the state were unconstitutionally divested by subsequent state legislation. These cases set out a legal framework for determining the existence of such a protected contractual relationship with a government. This framework, when applied to the facts of *Choate*, results in the finding of a contract between the Indians and the United States. *Choate* also cited at 672 *Keller v. Ashford*, 133 U.S. 610, (1890) and *Hendrick v. Lindsay*, 93 U.S. 143 (1876), in the course of its contractual analysis. *Keller* dealt with contractual obligations which may arise, in common law, from the acceptance of a deed. *Hendrick* dealt with contractual obligations which may arise, in common law, through negotiation for and acceptance of subsequently accruing benefits.

(5) This Court in *Choate* also significantly relied on *Jones v. Meehan*, 175 U.S. 1 (1899), which was said to exemplify the constitutional protection accorded to the private property rights of the individual Indians.[123] *Jones* clearly exemplifies the scope of that protection. A treaty with the Chippewas provided for the setting apart of a specific parcel of land for a Chippewa chief. This was held to be "a present grant of a complete title in fee simple; and that title is alienable by the grantee at his pleasure. . . ."[124] Title descended to the chief's son. The issue was whether Congress could subsequently interfere with the son's free exercise of his right, as fee simple owner, to lease the property. This Court's holding was well summarized in *Choate:*

> [T]he court held that the subsequent act could not relate back so as to interfere with the right of property which the Indian possessed and conveyed as an owner in fee, and while Congress had power to make treaties, it could not affect titles already granted by the treaty itself.[125]

(6) Finally, it should be observed that implicit in *Choate* is the recognition that the case purely involved a divestment of an Indian property right in favor of a non-Indian third party (the state). *Choate* did not involve a reallocation of Indian property between tribe and member.

123. 224 U.S. at 677.

124. 175 U.S. at 21.

125. 224 U.S. at 678. *See also Reichart v. Felps*, 73 U.S. (6 Wall.) 160 (1867), cited, but not discussed, in *Choate* for the proposition that Congress may not destroy private property rights. 224 U.S. at 671. *Reichart*, not a case involving Indians or Indian lands, dealt with lands which, pursuant to an act of Congress, were confirmed to individuals in fee by the delivery of patents. It was held that Congress could not, by subsequent legislation, nullify the previously-conveyed title.

Choate, then, stands for the following legal proposition: Congress may not, consistent with the Fifth Amendment, divest an allottee of a valuable attribute of his allotment for the benefit of a third party (such as a state) when that incident is provided for in a fully ratified contract between the Indians and the United States which has been executed through the actual making of allotments. That is, the *Choate* rule applies in the instance where: (1) there exists a valid contract between the Indians and the United States calling for the making of allotments having valuable attributes; (2) the contract is executed through the actual making of the allotments; and (3) Congress attempts subsequently to strip away, for the benefit of a non-Indian third party (such as the state), that valuable attribute of each executed allotment.

None of these three elements exist in the instant case: (1) the Northern Cheyenne Allotment Act of 1926 neither confirms, nor is otherwise based on, a contract between the United States and the Northern Cheyennes; (2) although allotments were made subsequent to the 1926 Act, the clear terms of both the Act and the allotment patents withheld minerals from allotment; and (3) the beneficiaries of the 1968 Amendment were the Northern Cheyenne tribal members as a whole.

The above analysis is thoroughly confirmed by examining the subsequent decisions of this Court and the lower federal courts.

d. *Decisions of This Court Subsequent to* Choate v. Trapp

That *Choate* did not absolutely preclude subsequent congressional elimination of the tax immunity involved in

Choate is demonstrated by two cases which followed *Choate*, *Sweet v. Schock*, 245 U.S. 192 (1917), and *Fink v. County Commissioners*, 248 U.S. 399 (1919). Both of these cases involved the Creek tax immunity which, under the reasoning of *Choate*, was held protected from congressional divestment in the case *English v. Richardson*, 224 U.S. 680 (1912), a companion to *Choate*.[126] *Sweet* and *Fink* dealt with the Act of May 27, 1908[127] involved in *Choate*, which eliminated restrictions on alienability of allotments and purported to remove the tax immunity of all newly-unrestricted allotments.[128] The allottees took advantage of the release of restrictions and conveyed their allotments; as a result, this Court was presented with the question of whether, under *Choate*, the tax immunity remained intact. The question was answered in the negative on the ground that Congress had the authority to enact—pursuant to a "new policy"[129] when "[a]ccomodation to new conditions became necessary"[130]—a statute which offered a new privilege (alienability) and exacted, in return, the release of a prior immunity (freedom from taxation).[131]

Furthermore, the decisions of this Court have expressly confirmed that *Choate* was founded on the existence of an *executed contract* between the Indians and the United States. *Gritts v. Fisher*, 224 U.S. 640 (1912),[132] decided on

126. *See* note 107, *supra*.

127. 35 Stat. 312.

128. *Sweet* involved, additionally, another similar act, the Act of April 26, 1906, 34 Stat. 137.

129. 248 U.S. at 404.

130. 245 U.S. at 195.

131. *See also Morrow v. United States*, 243 F. 854, 859 (8th Cir. 1917).

132. *Gritts* is discussed in detail at section 2, *supra*.

the same day as *Choate*, rejected a Fifth Amendment argument that a 1902 allotment act had created vested rights in allottees:

> The difficulty with the appellants' contention is that it treats the act of 1902 as a contract, when "it is only an act of Congress and can have no greater effect." . . . It was but an exertion of the administrative control of the Government over the tribal property of tribal Indians, and was subject to change by Congress at any time before it was carried into effect and while the tribal relations continued.[133]

See Sizemore v. Brady, 235 U.S. 441, 450 (1914), and *United States v. Jim*, 409 U.S. 80, 83 (1972), in which the identical language is applied to deny vested rights arguments.[134]

That the existence of a contract is fundamental to the *Choate* reasoning has been expressly recognized in *Brader v. James*, 246 U.S. 88 (1918), another case dealing with the limits of congressional power over allotments:

> The plaintiff in error relies upon *Choate v. Trapp*, 224 U.S. 665, in which this court sustained a contractual exemption as to taxation of certain Indian lands. In that case the right of exemption was based upon a valid and binding contract. . . .[135]

Recognition is contained as well in the following decisions of this Court, all dealing with allotment legislation: *Woodward v. DeGraffenried*, 238 U.S. 284, 315 (1915); *Sweet v. Schock*, 245 U.S. 192, 196 (1917); *Carpenter v. Shaw*, 280 U.S. 363, 366 (1930) (a case dealing with the tax immunity involved in *Choate*); and *Mahnomen County v.*

133. 224 U.S. at 648.

134. These cases are discussed at section 2, *supra*.

135. 246 U.S. at 97.

United States, 319 U.S. 474, 476 (majority opinion), 480 (dissenting opinion) (1943).

Moreover, it is noteworthy that the notion of contract has traditionally played a significant role in the public land decisions of this Court. This is, perhaps, best exemplified in decisions dealing with so-called "lieu" selections of public land. *Wyoming v. United States*, 255 U.S. 489, 497 (1921); *Payne v. New Mexico*, 255 U.S. 367, 369 (1921); *Payne v. Central Pac. Ry.*, 255 U.S. 228, 235 (1921). In each of these cases, a party, (either a state or a railroad), pursuant to federal statute, relinquished matured rights to selected public lands in return for a statutory promise of substitute or lieu lands. The lieu selections were enforced against the United States on the ground of contract:

> The provision under which the selection was made was one inviting and proposing an exchange of lands. By it Congress said in substance to the State: If you will waive or surrender your title tract in the reservation, you may select and take in lieu of it a tract of like area. . . . Acceptance of such a proposal and compliance with its terms confer a vested right in the selected land which the land officers cannot lawfully cancel or disregard.[136]

In addition, as the *Choate* analysis indicates, it is the *execution* of the allotment, pursuant to the contract, which ultimately vests rights. This is illuminated in *Sizemore v. Brady*, 235 U.S. 441 (1914):

> The land and funds to which [the agreement] related were tribal property and only as it was carried into effect were individual claims to be fastened upon them. Unless and until that was done Congress possessed plenary power to deal with them as tribal property.

136. *Payne v. New Mexico*, 255 U.S. 367, 370. *See also Burke v. Southern Pacific R.R.*, 234 U.S. 669, 679-80 (1914); *United States v. Southern Pacific R.R.*, 223 U.S. 565, 570 (1912).

> It could revoke the agreement and abandon the purpose to distribute them in severalty, or adopt another mode of distribution, or pursue any other course which to it seemed better for the Indians. . . . In short, the power of Congress was not exhausted or restrained by the adoption of the original agreement, but remained the same thereafter as before, save that rights created by carrying the agreement into effect could not be divested or impaired. *Choate v. Trapp*, 224 U.S. 665, 671.[137]

Accord, United States v. Rowell, 243 U.S. 464, 470 (1917). And, *see Levey v. Stockslager*, 129 U.S. 470 (1889).

This principle regarding the *execution* of allotment finds support in *Nadeau v. Union Pacfic R.R.*, 253 U.S. 442 (1920),[138] which upheld Congress' power to impose railroad rights-of-way on land which was to be allotted under a prior treaty:

> It seems plain that, at least, until actually allotted in severalty (1864) the lands were but part of the domain held by the Tribe. . . .
>
> The grant of the right-of-way in 1862 . . .took effect as of the date of the act. All who thereafter acquired public lands took subject to such granted right . . . . Although parties to the Treaty of 1861 contemplated future allotments, it made none. No individual title to any portion of the land arose until allotted, and none was allotted until after 1862.[139]

See United States v. Jackson, 280 U.S. 183, 191 (1930). Analogously, in *Mullen v. Pickens*, 250 U.S. 590 (1919), conveyances—prior to the issuance of allotment patents—of lands which were to be allotted under an agreement were struck down on the ground that "the lands prior to allotment were to remain communal, without private interest

137. 235 U.S. at 449-50.

138. *Nadeau* is discussed in detail at section 2, *supra*.

139. 253 U.S. at 445-46.

that was capable of descent or alienation."[140] *See Franklin v. Lynch*, 233 U.S. 269 (1914), where the interest of a prospective allottee prior to actual allotment was characterized as "a mere float or expectancy."[141]

e. *Decisions of Lower Federal Courts Subsequent to* Choate v. Trapp

A thorough survey of the decisions of lower federal courts applying *Choate* indicates that *Choate* has served primarily as a shield against state taxation of trust allotments. The typical fact pattern of such cases is as follows: a county or state endeavors to tax allotted lands, on the basis that a federal statute, enacted subsequent to the issuance of the allotment patent (generally issued pursuant to an agreement) has divested the allotment of its tax immunity. This is precisely the fact pattern in *Choate*. In each of these cases, the taxation is disallowed on the ground that, under *Choate*, Congress lacked Constitutional authority to divest the tax immunity.

The leading lower federal court case is *Morrow v. United*

140. 250 U.S. at 594.

141. 233 U.S. at 272. The above authorities do not conflict with the Mission Indian allotment litigation, consisting of *St. Marie v. United States*, 108 F.2d 876 (9th Cir. 1940), *cert. denied*, 311 U.S. 652 (1940); *Arenas v. United States*, 322 U.S. 419 (1944); *United States v. Arenas*, 158 F.2d 730 (9th Cir. 1946). These cases dealt simply with the extent to which the *Secretary of the Interior* had discretionary power, under the particular allotment act, to withhold final approval of allotment selections. The Ninth Circuit ultimately held that the Secretary lacked discretionary power, under the act, to deny approval because of his antagonism to the allotment policy. *See also United States v. Pierce*, 235 F.2d 885 (9th Cir. 1956). The distinct issue of the extent to which *Congress* possessed authority to enact legislation barring final approval of pending Mission Indian allotment selections was dealt with in *The Constitutional Power of Congress to Enact Legislation Concerning the Allotment of Lands to the Mission Indians of California*, 56 I.D. 102 (1937). In that decision, the Solicitor of the Department of the Interior held that Congress possessed such power. *See Clark, Jr. v. Benally*, 51 I.D. 91 (1925), *aff'd on rehearing* 51 I.D. 98 (1925).

States, 243 F. 854 (8th Cir. 1917), involving a Chippewa allotment issued pursuant to the Nelson Act,[142] and consummated by the issuance of a trust patent in 1902, under which the land was to be non-taxable for 25 years. In 1906, Congress enacted the Clapp Amendment,[143] which purported unilaterally to extinguish the tax immunity and provided for conversion of trust patents to fee simple patents. The court struck down this attempt to divest the immuity, on the following analysis:

> There is no question that the government may, in its dealings with the Indians, create property rights which, once vested, even it cannot alter. *Williams v. Johnson,* 239 U.S. 414, 420, 36 Sup.Ct. 150, 60 L.Ed. 358; *Sizemore v. Brady,* 235 U.S. 441, 449, 35 Sup.Ct. 135, 59 L.Ed. 308; *Choate v. Trapp,* 224 U.S. 665, 32 Sup.Ct. 565, 56 L.Ed. 941; *English v. Richardson,* 224 U.S. 680, 32 Sup.Ct. 571, 56 L.Ed. 949; *Jones v. Meehan,* 175 U.S. 1, 20 Sup.Ct. 1, 44 L.Ed. 49; *Chase v. United States,* 222 Fed. 593, 596, 138 C.C.A. 117. Such property rights may result from agreements between the government and the Indian. Whether the transaction takes the form of a treaty or a statute is immaterial; the important considerations are that there should be the essentials of a binding agreement between the government and the Indian and the resultant vesting of a property right in the Indian.
>
> That exemption of land from taxation is a property right is established. *Choate v. Trapp, supra.* That this Indian had taken possession of and was enjoying this land under such an exemption at the time the Clapp Amendment was passed is undisputed. Therefore, if this exemption came to him as a legal right, it had fully vested. It came as such legal right if it rested on the solid basis of a binding agreement.[144]

142. Act of January 14, 1889, 25 Stat. 642.

143. Act of June 21, 1906, 34 Stat. 353.

144. 243 Fed. at 856.

The Court then went on to detail the negotiations between the United States and the Indians which resulted in the relinquishment by the Indians of recognized claims to vast lands in return for allotments and distribution of other tribal assets. The Court continued:

> The commissioners provided for in the act secured the written consent of the required number of Indians only after almost six months of patient negotiations. The cession was later ratified by the President and thereupon became effective, the Indians removed to the two reservations, relinquished the balance of their lands, and received allotments in severalty.
>
> Thus the terms of this act, as well as its attendant circumstances, leave no doubt that this act required, before it should become effective, an agreement to its terms by the Indians and the cession by them of very valuable tracts of land to which their title was unimpeached. The Indians fully performed their part of the agreement, and it was in exact performance upon its side that the government allotted to this Indian his land and was holding it for him at the time the Clapp Amendment was enacted. Such a proposal, acceptance, passage of consideration, and performance between private parties would constitute a valid contract. The character of this transaction is not changed because one of the parties to it is the government.[145]

This analysis was followed completely in *United States v. Spaeth,* 24 F.Supp. 465, 466-67 (D. Minn. 1938).

In the Ninth Circuit, substantially similar fact patterns have given rise to identical analyses. *United States v. Benewah County, Idaho,* 290 F. 628 (9th Cir. 1923); *United States v. Nez Perce County, Idaho,* 95 F.2d 232 (9th Cir. 1938); *Glacier County, Mont. v. United States,* 99 F.2d 733 (9th Cir. 1938); *United States v. Ferry County, Wash.,*

145. 243 F. at 857.

24 F.Supp. 399 (E.D. Wash. 1938); *United States v. Ferry County*, 39 F.Supp. 1007 (E.D. Wash. 1941).

In *Benewah*, a patent for a tax-exempt allotment had been issued, subsequent to treaties under which the Indians ceded extensive lands. Thereafter, the Secretary unilaterally issued a patent in fee and the county commenced assessing taxes. The reasoning of the court, adhered to in each of the subsequent Ninth Circuit decisions,[146] was as follows:

> The Indians were guaranteed nontaxable land for the period of 25 years after the issuance of the trust patents. In *Choate v. Trapp* the Court gave consideration to the fact that the Indians were offered the allotments on the conditions proposed, and that by accepting the terms and relinquishing their claims they furnished a consideration which was sufficient to entitle them to enforce whatever rights were conferred. One of those rights was exemption from taxation. . . .
>
> So in the present case the right of the Indians to have their allotments held in trust by the United States free from taxation by local authorities for a period of 25 years was a valuable right. Once vested as it was, it could only be divested by due process of law.[147]

Finally, Tenth Circuit cases are to the same effect. Tax immunities incident to fully consumated allotments are protected, on reasoning such as the following:

> That Cherokee homesteads acquired under the Allotment Act of July 1, 1902, are non-taxable as long as they are held by the allottees seems to have been settled by the decisions in *Choate v. Trapp* . . . and the two cases that immediately follow it. . . . The relations between the Five Civilized Tribes and the

146. *United States v. Nez Perce County, Idaho*, 95 F.2d 232, 235-36; *Glacier County, Mont. v. United States*, 99 F.2d 733, 734-35; *United States v. Ferry County, Wash.*, 24 F.Supp. 399, 400-01; *United States v. Ferry County*, 39 F.Supp. 1007, 1010-12.

147. 290 F. at 631.

> United States in the division of tribal lands between the members of the tribes in severalty was contractual. The Cherokees were given the privilege of determining by vote of its members whether it would accept the proposals. They did accept. . . . It was therefore held [in *Choate*] that the acceptance of deeds containing exemption of the land from taxation under the allotment acts operated as full performance by the allottees of the contract and created a vested right in the Indian of the exemption which is protected by the Fifth Amendment.

Board of Comm'rs of Tulsa County, Okla. v. United States, 94 F.2d 450, 451 (10th Cir. 1938). *Accord, Bryan County, Okla. v. United States*, 123 F.2d 782, 784 (10th Cir. 1941); *Landman v. Commissioner of Internal Revenue*, 123 F.2d 787, 789-90 (10th Cir. 1941); *United States v. Board of Comm'rs of Comanche County, Okla.*, 6 F.Supp. 401, 402-03 (W.D. Okla. 1934).

4. The Circumstances Surrounding the 1926 Act and the Legislative History of the Act Clearly Support the Act's Meaning—Namely, That All Reservation Minerals Be Withheld From Allotment, Retained in Tribal Ownership, and Made Subject To Continuing Congressional Control.

While the plain language of the 1926 Act of and by itself conveys the Act's intent, lest there be any question, attention is herein directed to the circumstances surrounding the Act and the Act's legislative history.[148] As this Court has

148. The legislative history of a statute may be judicially noticed. *Territory of Alaska v. American Can Co.*, 358 U.S. 224 (1959). The court may consider reports of congressional committees, comparisons of successive drafts or amendments to the measure, and congressional debates. *Wright v. Vinton Branch of the Mountain Trust Bank of Roanoke*, 300 U.S. 440 (1937). In addition, the court may consider the historical setting from which the statute arose to determine congressional intent. *The Delaware*, 161 U.S. 459, 474 (1896); *Platt v. Union Pacific R.R.*, 99 U.S. 48, 67 (1878).

pointed out, in seeking congressional intent when Indian legislation is involved, consideration should be given to "the circumstances in which the reservation was created—the power of Congress in the premises, the location and character of the [Indian lands], the situation and needs of the Indians and the object to be attained." *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 87 (1918). Hence, it is appropriate if not necessary to examine the general history and condition of the Northern Cheyennes; the relationship between the Tribe and Congress from the time of the Reservation's establishment until the early 1920s; the interaction between the Tribe and Congress from the early 1920s until the 1926 passage of the allotment act; and, finally, attention will be devoted to the full legislative history of the 1926 Act.

a. *History and Condition of the Northern Cheyennes*

The Northern Cheyenne Tribe was the last American Indian tribe to receive allotment. Allotments were not actually made on the Reservation until 1932, two years before Congress terminated the allotment system.[149] Congress' reluctance to bestow the "civilizing" [150] benefits of allotment on the Northern Cheyennes arose from the unique history and character of this people.

The Northern Cheyenne—a remarkably proud, courageous and skilled tribe of warriors—fiercely resisted the white man's march into the Great Plains. The Northern Cheyenne, with the Sioux, defeated Custer at Little Bighorn in 1876 and responded to their subsequent banish-

149. Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. §§ 461-62 (1970).

150. *See* W. WASHBURN, THE ASSAULT ON INDIAN TRIBALISM: THE GENERAL ALLOTMENT LAW (DAWES ACT) OF 1887 28-31 (1975).

ment to Oklahoma with a defiant trek back to Montana in 1878 to reclaim their homeland which is now the Reservation. Indeed, it is believed that no other tribe, with the possible exception of the Sioux, played a greater part in resisting the settlement of the Plains.[151]

Unlike most tribes, the Northern Cheyenne were not placed on a reservation until 1884. An Executive Order established a reservation of 371,200 acres[152] (immediately to the east of the 3,504,000-acre reservation of the traditional enemy of the Northern Cheyenne, the Crow—who had served as Custer's scouts at Little Bighorn).

Throughout the next fourteen years, Congress took no legislative action whatsoever with respect to the Northern Cheyennes. In 1898, to alleviate friction and bloodshed between the Northern Cheyenne and whites on the Reservation, Congress directed that an inspector be sent to the Reservation to determine the feasibility of transferring the Northern Cheyennes to the Crow Reservation.[153] James McLaughlin—a man with unique and vast experience in the Indian Service [154]—was appointed by the Secretary of the Interior to conduct this inspection. The following year, 1899, McLaughlin reported his findings.[155] He reported that the Northern Cheyennes were "among the least civilized of the Indian Tribes," and were regarded by the Crows

151. R. ANDRIST, THE LONG DEATH—THE LAST DAYS OF THE PLAINS INDIANS 70 (1964); DEP'T OF THE INTERIOR, ANNUAL REPORT FOR 1920, vol. II, REPORT OF THE BOARD OF INDIAN COMMISSIONERS 30-31 (1920).

152. I C. KAPPLER, INDIAN AFFAIRS—LAWS AND TREATIES 860 (1904) (pages A-7-8, *infra*).

153. Act of July 1, 1898, 30 Stat. 571, 596.

154. *See* J. MCLAUGHLIN, MY FRIEND THE INDIAN (1963 ed.).

155. H.R. REP. No. 153, 55th Cong., 3d Sess. (1899).

as "uncivilized and aggressive."[156] McLaughlin concluded that the removal of the Northern Cheyennes to the Crow Reservation was not feasible. He endorsed, instead, the buying-out of the white interests on the Reservation and the enlargement of the Reservation. These recommendations were adopted.[157]

Congressional activity with respect to the Tribe from 1903 until the 1926 allotment act was but nominal and limited.[158] While other reservations in Montana and throughout the country were the objects of individualized allotment acts and other tailored legislation, Congress neglected the Northern Cheyenne.

This congressional neglect was documented in the course

156. *Id.* at 5. In his memoirs, McLaughlin noted that he found the Northern Cheyennes to be exceptionally proud and accomplished warriors, whose "advance in the arts of civilization was handicapped by their warlike attributes . . . and they were not curbed for many years after the other warlike tribes had accepted the conditions imposed by the whiteman." J. McLaughlin, My Friend the Indian 81 (1963 ed.).

157. Executive Order of March 19, 1900 (pages A-8-9, *infra*); Act of March 3, 1903, 32 Stat. 982, 1000.

158. This congressional activity consisted exclusively of occasional one or two sentence provisions within yearly Indian appropriations acts. Act of June 21, 1906, 34 Stat. 325, 354 (for purchase of livestock); Act of March 1, 1907, 34 Stat. 1015, 1035 (for irrigation system); Act of April 4, 1910, 36 Stat. 269, 277 (for industry and farming); Act of June 30, 1913, 38 Stat. 77, 90 (for tribal funds to be used for purchase of cattle and other articles); Act of August 1, 1914, 38 Stat. 582, 593 (for subsistence, civilization and purchase of cattle); Act of June 30, 1919, 41 Stat. 3, 16 (travel funds for support and civilization, funds for irrigation district); Act of February 14, 1920, 41 Stat. 408, 421 (tribal funds for support and civilization, funds for irrigation); Act of March 3, 1921, 41 Stat. 1225, 1226, 1237 (tribal funds for support and civilization, funds for irrigation); Act of May 24, 1922, 42 Stat. 552, 560, 571 (funds for irrigation); Act of January 24, 1923, 42 Stat. 1174, 1181, 1192 (tribal funds for support and civilization, funds for irrigation); Act of June 5, 1924, 43 Stat. 390, 400, 411 (funds for irrigation); Act of March 3, 1925, 43 Stat. 1141, 1151, 1160 (tribal funds for support and civilization, funds for irrigation); Act of May 10, 1926, 44 Stat. 453, 473 (tribal funds for support and civilization).

of the *Senate Survey of Conditions of the Indians in the United States,*[159] a survey which reexamined government Indian policies.[160] In September of 1928 the Senate sent Special Investigator Walter W. Liggett to the Montana reservations, including the Northern Cheyenne, to study and report on conditions.[161] As to the Northern Cheyennes, Liggett reported:

> The Northern Cheyenne Indians probably are the most primitive among the tribes in the northern part of the United States. With the Sioux, their allies, they were the last Indians to become "pacified" after the Custer battle in 1876. The reservation is isolated, and the fact that it has not been allotted has kept whites away. Consequently these Indians are probably more backward and closer to savagery than any other Montana Indians. *They* are not well organized and *have not importuned Congressmen or Senators for special favors.* As a result they seem to have been neglected by the Indian Bureau, and the sanitary and economic conditions existing on the Tongue River [*i.e.*, Northern Cheyenne] Reservation is a damning indictment of bureaucratic indifference. This reservation is literally a plague spot, and the entire Northern Cheyenne Tribe is rotten with disease. The actual conditions repeatedly have been called to the attention of responsible Indian Bureau officials at Washington, D.C. No attempt whatever has been made to ameliorate the perfectly appalling health situation. In fact, the Indian Bureau refused to finance a Red Cross unit which was established on the reservation and discontinued the services of a single field matron who was doing splendid work. The inevitable result is that the health

159. This survey was initiated by Sen. Res. 79, 70th Cong., 1st Sess. (1928).

160. And, *see generally* W. Hagan, American Indians 152-53 (1961)

161. *See Hearings on Indian Affairs Before a Subcomm. of the Senate Comm. on Indian Affairs,* 72d Cong., 1st Sess., pt. 23, "Montana" at 12435 (Fort Peck); 12520 (Rocky Boy); 12597 (Fort Belknap); 12746 (Blackfeet); 12841 (Northern Cheyenne); 12939 (Crow) (1929).

situation on the Tongue River Reservation is steadily growing worse and now has reached a stage so unbelievably bad that it constitutes a black blot on the American flag. We have established sanitary zones in the Philippines and the Caribbean, but the Cheyenne Indians are allowed to slowly perish amid almost indescribable dirt, disease, and general degradation. It is almost incredible that responsible officials of any civilized government should permit such disgraceful conditions in this day and age. That such conditions do exist on the Tongue River Reservation reveals the characteristic callousness of the Indian Bureau—or else its total lack of imagination—in dealing with the human factors of health and happiness of its helpless wards. It is very difficult to discuss the situation on Tongue River Reservation in moderate language, but the following facts seem to justify any superlatives that may be called forth by honest indignation. [emphasis added][162]

The Northern Cheyennes' reticence to seek congressional favors, as noted by Liggett, is of vital importance to this case. Indeed, this reticence is attested to by the total lack of significant congressional action with respect to the Northern Cheyenne during the first quarter of the twentieth century. This history of reluctance to pursue congressional favors points up the immense significance of a singular event which occurred on the Reservation in early

162. *Id.* at 12841-42. While Special Inspector Liggett's language is unquestionably harsh, it is in fact credible. The texts of Liggett's reports on other reservations (note 161 *supra*) make it clear that he was an objective observer of reservation life, not prone to hyperbole. Beyond being an objective observer, Liggett was also quite astute. As early as 1928 he had observed: "The entire Tongue River [*i.e.*, Northern Cheyenne] Reservation is underlaid with a thick vein of coal. There are frequent outcroppings. This coal seems to be a cross between lignite and bituminous coal and is of fairly high quality. . . . The coal on the Tongue River Reservation cannot be developed commercially at this time, owing to lack of rail facilities. There is no doubt, however, that some time the coal will prove a valuable asset." *Id.* at 12848. In addition, *see* DEP'T OF THE INTERIOR, ANNUAL REPORT FOR 1920, vol. II, REPORT OF THE BOARD OF INDIAN COMMISSIONERS 30 (1920).

1925, an event of unique importance to the proper construction of the 1926 allotment act—a tribal petition to Congress.

b. *The 1925 Northern Cheyenne Petition To Congress*

By 1924, the Northern Cheyenne people were painfully aware that they had not yet received an allotment act. Aside from the Rocky Boy Reservation, which was never to be allotted, all other Indian reservations in the State of Montana had received allotment acts.[163] Thus, the Tribe began a course of correspondence and discussion with members of the Montana congressional delegation in hopes of procuring an act of allotment.

In October of 1924, a tribal committee met with Senator Thomas J. Walsh of Montana to advise him of the Tribe's desire for allotment.[164] The following month, a tribal representative wrote to the Senator:

> I believe this is one of the last reservations that is unallotted, therefore, I have taken this matter up with various people, in fact, we have talked about it for the last four or five years, and we have finally come to the conclusion to ask you to help us.
>
> . . . .
>
> It is high time that something is done for the Northern Cheyenne Indians. We want to be abreast of times. . . .[165]

In early December, 1924, Walsh urged the Commissioner of Indian Affairs, Charles H. Burke, to draft a Northern Cheyenne allotment bill for introduction in Congress.[166]

163. *See* section 4d, *infra*.

164. Appendix at A-49.

165. Appendix at A-47-48.

166. Appendix at A-49.

Commissioner Burke responded that such allotment was not advisable, because the land was not suitable for farming.[167] Shortly thereafter, Senator Walsh transmitted the Commissioner's refusal to the Tribe and solicited the Tribe's help in overcoming the Commissioner's opposition:

> I wish, accordingly, that you would arm me with whatever information you can gather in opposition to the views expressed by the Commissioner in his letter. It might be that thus armed, I could change the views of the Commissioner, or failing in that, prevail upon the Secretary to give his support to the allotment plan.[168]

This request brought forth an overwhelming and unprecedented response from the proud and typically reticent Northern Cheyennes—namely, a tribal petition to Congress, an emphatic declaration of tribal hopes and expectations. Introducing this petition was a letter of February 3, 1925, signed by tribal chiefs and headsmen. Sent to Senator Walsh, the introductory letter began:

> We transmit herewith a petition signed by all of the people belonging to this reservation that we were able to see in the short time allowed. In fact we encountered no opposition whatever, and they were all in hearty accord with the allotment idea. Also, we thought it advisable to get you the following data and reasons for allotment so as to arm you for argument with the Indian Office. We can assure you in

167. Commissioner Burke wrote to Senator Walsh: "The reservation is generally rough and ninety-five per cent of the land is unsuitable for agricultural purposes, being of value only when used in connection with livestock and grazing industries. The range can be used to much greater advantage by holding it, at least for present, as tribal property. . . ." Appendix at A-50. Members of the Board of Indian Commissioners held similar views. DEP'T OF THE INTERIOR, ANNUAL REPORT FOR 1919, vol. II, REPORT OF THE BOARD OF INDIAN COMMISSIONERS 252-56 (1920); DEP'T OF THE INTERIOR, ANNUAL REPORT FOR 1920, vol. II, REPORT OF THE BOARD OF INDIAN COMMISSIONERS 31 (1920).

168. Appendix at A-52.

> advance that all data contained in our letter is authentic.[169]

The entire tribal petition reads:

> We, the undersigned members of the Northern Cheyenne Indian Tribe of the State of Montana, do hereby humbly beseech you to do all in your power to have a bill introduced and passed in Congress, to have an allotment of not less than 320 acres of tillable farm land made to each and every member of the Northern Cheyenne Indians.
>
> *To reserve all mineral, timber, and coal lands for the benefit of the Northern Cheyenne Indian Tribe, said tribe to have absolute control of same.*
>
> As our Reservation is rather small, and we understand that the old Fort Keough Military Reservation has been abandoned for military purposes, we ask you to try and have it turned over to the Northern Cheyenne Indians so that we may have enough land to give each member of the tribe the above asked for 320 acres. [emphasis added][170]

Attached to this petition were 37 pages bearing the signatures, marks, and thumbprints of approximately 490 men and women of the Tribe.[171] In view of this petition, there can be no doubt that the Northern Cheyenne people de-

169. Appendix at A-53.

170. Appendix at A-56.

171. Appendix at 57-93. This constituted a majority of the adult members of the Tribe. In 1925, there were approximately 1,408 Northern Cheyennes on the Reservation. H.R. REP. No. 383, 69th Cong., 1st Sess. 1 (1926). From statistics for prior years (DEP'T OF THE INTERIOR, ANNUAL REPORT FOR 1906 263 (1907)) and subsequent years (NAT'L ARCHIVES, INSPECTION REPORT—NORTHERN CHEYENNE INDIAN RESERVATION, Record Group No. 75, Box 148, Folder 150, at 1), it can be reliably determined that adult members constituted between 52 and 60 per cent of the total tribal population. Applying the higher percentage to the 1925 population yields 845 adult Northern Cheyennes in 1925. Thus, as a conservative figure, approximately 58 per cent of the adult members of the tribe signed the 1925 petition to Congress.

sired that the ownership and control of all Reservation minerals be retained by the Tribe.[172]

As the complete texts of the letter[173] and the petition amply demonstrate, the Northern Cheyennes viewed allotment as a means of procuring a plot of surface for home-building, farming, and grazing. That this remained their sole and exclusive interest throughout was demonstrated beyond question in their statements to Special Investigator Liggett in 1928 and their testimony to a subcommittee of the Senate Committee on Indian Affairs in 1929.[174] Furthermore, this view did not change when actual allotting commenced in 1932. The language of the trust patent unequivocally reserves the minerals on the Reservation to the Tribe—indeed, without even mentioning, let alone conveying, an allottee's future interest in the minerals.[175]

c. *Formulation and Passage of the 1926 Northern Cheyenne Allotment Act*

Early in 1926, Congress,[176] the Department of the In-

172. Moreover, the tribal petition to Congress possessed ongoing significance to the Northern Cheyenne people. For example, a 1928 statement from tribal member John Blackwolf to Special Investigator Liggett asserted: "Before the Reservation was surveyed, and before the bill was passed, *we made a petition and signed it* to get 320 acres for each person." *Hearings on Indian Affairs Before a Subcomm. of the Senate Comm. on Indian Affairs*, 72d Cong., 1st Sess., pt. 23, at 12855 (1929) [emphasis added].

173. Appendix, at A-53-55.

174. Numerous tribal leaders and members presented testimony and recorded statements which indicated the entire range of their interests and concerns regarding Reservation land use. From the testimony and statements it could not be clearer that their goals related only to farming, grazing, and home-building. *Hearings on Indian Affairs Before a Subcomm. of the Senate Comm. on Indian Affairs*, 72d Cong., 1st Sess., pt. 23, at 12779-871 (1929).

175. Appendix at A-45-46. And, *see* District Court Opinion, at note 28 (Petition for Certiorari at A-26).

176. Representative Scott Leavitt of Montana was the House sponsor

terior, and Northern Cheyenne representatives[177] began formulating an allotment bill for the Northern Cheyenne; on June 3, 1926, an allotment act for the Tribe was passed. From a careful study of the surrounding legislative process, it becomes apparent that all parties had proceeded throughout with the intent that the allotment act should serve two limited, specific functions: limited surface estates should be allotted to enable the development of individual homesteads; and, all remaining lands and natural resources—particularly minerals—should be withheld from allotment and confirmed and preserved in tribal ownership for the collective use and benefit of the Tribe. It must be conceded that the legislative record contains no evidence expressly explaining the origin of the provision to transfer minerals 50 years hence. However, taken as a whole and taken in light of the clear purposes of the Act, the record indicates that the setting of a date, 50 years hence, for the transfer of the minerals was nothing more than an administrative detail—a detail ancillary to the primary congressional purpose of withholding Reservation minerals from allotment so that these minerals could be developed for the use and benefit of *all* members of the Tribe.

On February 17, 1926, Secretary of the Interior Hubert Work sent a letter to the Chairman of the House Committee on Indian Affairs, Representative Scott Leavitt of

of the 1926 Act; Senator Thomas J. Walsh of Montana was the Senate Sponsor. 67 CONG. REC. 5449, 6312, 9735-36, 9848, 9885-86, 9901 (1926).

177. John Stands In Timber and Eugene Fisher were in Washington, D.C. during this period as representatives of the Tribe with respect to the allotment bill. 67 CONG. REC. 5449, 6312, 9735, 9886 (1926). Mr. Stands In Timber, especially, was a respected member of the Tribe and spokesman for the Northern Cheyenne people. M. LIBERTY & J. STANDS IN TIMBER, CHEYENNE MEMORIES 3-10 (1967).

Montana, proposing and recommending a Northern Cheyenne allotment act. Secretary Work stated:

> Up to the present none of the lands there have been allotted in severalty for the reason that it has been thought best to keep the entire reservation in tribal status for general grazing purposes. It is now believed that a part of the agricultural lands may be advantageously allotted. . . .
>
> The proposed bill also provides. . . for a report by the Geological Survey, covering the lands that may be listed for allotment, as to coal and other mineral deposits. . . .In the event any of the land listed for allotting is found to contain coal or other minerals, it is contemplated to reserve all such minerals for the Tribe and to allot the surface only.[178]

Secretary Work's proposed bill limited each allotment to 80 acres of agricultural land:

> The Secretary of the Interior shall also cause to be prepared. . . a list of the lands of said Indian reservation. . .which may be used advantageously for agricultural purposes . . .and after the approval of said list of agricultural lands, the Secretary of the Interior is hereby authorized to make allotments in severalty to the duly enrolled Indians in areas not exceeding eighty acres to any individual, from the lands appearing on said approved list. . . .[179]

However, the proposed bill stipulated that prior to actually allotting these listed agricultural lands, the Geological Survey was to examine them for minerals. If coal or other minerals were found on these listed lands, only their surface was to be allotted; the lands' minerals were to remain in tribal ownership for fifty years and *then* be allotted:

> That prior to making the allotments as authorized herein, the Secretary of the Interior shall cause an examination to be made by representatives of the Geological Survey of all lands included on said approved list . . .for the purpose of determining the mineral character thereof. . .and if any of the land shall be found to contain coal or other minerals, only the surface thereof may be allotted, and all minerals on said lands are hereby reserved for the benefit of the tribe: *Provided,* That at the expiration of fifty years . . .the coal or other mineral deposits of said allotments shall become the property of the respective allottees or their heirs or assigns.[180]

178. H.R. REP. No. 383, 69th Cong., 1st Sess. 1-2 (1926) (page A-13, *infra*).

179. H.R. 9558, 69th Cong., 1st Sess. (1926) (page A-10, *infra*).

On February 19, 1926, the above bill was introduced in the House of Representatives; an identical bill was introduced in the Senate on February 24, 1926.[181]

Report of the House Committee and House Passage of an Amended Bill

The House Committee on Indian Affairs promptly reported on the Northern Cheyenne bill and recommended its passage—with one significant amendment.[182] The Committee recommended that the provision covering allotment of surface and reservation of minerals be more broadly worded:

> That only the surface of any lands in this reservation may be allotted, and all minerals on said lands are hereby reserved for the benefit of the tribe; *Provided further,* That at the expiration of fifty years from the date of approval of this Act, the coal or other mineral deposits of said allotments shall become the property of the respective allottees or their heirs or assigns.

The bill, with the above Committee amendment, was reported out to the House on February 25, 1926.[183] The

180. *Id.* (at A-11, *infra*).

181. S. 3261, 69th Cong., 1st Sess. (1926).

182. H.R. REP. No. 383, 69th Cong., 1st Sess. (1926), (pages A-12-13, *infra*).

183. *Id.* (at A-12, *infra*).

next month, on March 29, 1926, the bill, as amended, was passed by the House.[184]

Report of the Senate Committee and Senate Passage of a Further Amended Bill

Three weeks later, the Senate Committee on Indian Affairs reported out the bill and recommended its passage, with the following four significant amendments:[185] (1) an opening section was added which explicitly confirmed tribal title to the entire Reservation and specifically stated Congress' continuing control over the tribal lands:

> That the Northern Cheyenne Indian Reservation heretofore set apart by Executive order dated the 19th day of March, 1900, for the permanent use and occupation of the Northern Cheyenne Indians, in Montana, be, and the same is hereby, declared to be the property of said Indians, subject to such control and management of said property as the Congress of the United States may direct.

(2) The allotment tracts were increased from 80 acres of agricultural land to 160 acres of agricultural, grazing, and timber land. (3) The requirement that the Geological Survey make an examination for minerals was deleted. Instead, the provision withholding "minerals" from allotment was broadened to encompass "coal or other minerals, including oil, gas, and other natural deposits," followed by a provision specifically declaring Congress' continuing control over all lands withheld from allotment:

> That the timber, coal or other minerals, including oil, gas, and other natural deposits, on said reservation are hereby reserved for the benefit of the tribe: *Provided,* That at the expiration of fifty years from the

184. 67 Cong. Rec. 6312 (1926).

185. S. Rep. No. 638, 69th Cong., 1st Sess. (1926) (pages A-14-17, *infra*).

> date of the approval of this Act the coal or other minerals, including oil, gas, and other natural deposits, of said allotments shall become the property of the respective allottees or their heirs: *Provided further,* That the unallotted lands of said tribe of Indians shall be held in common, subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians.

(4) A provision was added calling for the per capita distribution of all income derived from the unallotted minerals and timber.

On the floor, the Senate bill was further amended—the tribal council was granted power to lease the reserved minerals and natural deposits. Under the sponsorship of Senator Walsh of Montana, this amended bill was then initially passed by the Senate on May 20, 1926.[186] In addition, before final passage, one other relevant amendment was made—the provision calling for per capita distribution of income from minerals was changed to provide that all such income be held for the benefit of the Tribe as a whole.[187]

Passage of the Final Bill

The Northern Cheyenne allotment bill, so amended, was passed by the House[188] and the Senate.[189] Upon passage in the House, Representative Leavitt, the bill's sponsor, made the following remarks:

> During the summer of 1925 and the previous year, I met delegations of Indians from the Tongue River [*i.e.*, Northern Cheyenne] Reservation to discuss the problems confronting them and I became convinced

186. 67 Cong. Rec. 9735-36 (1926).

187. 67 Cong. Rec. 9885-86 (1926).

188. *Id.*

189. 67 Cong. Rec. 9901 (1926).

that one of the things required was to allot land to the members of the tribe so that they would be able to have permanent homes and develop their own farms and livestock acitivities.

. . .The bill as I introduced it was discussed here in Washington with members of the Tribe who came here for that purpose. . . .Senator WALSH has also given a good deal of consideration to the measure. . . . The Senator from Montana and the Senator from Wyoming have been in conference with representatives of the Indians, as I have been continually myself.

This is a very important bill to the Indians, because it not only provides an allotment of 160 acres to each member of the tribe but it also preserves the tribal grazing and timberlands for the benefit of the entire tribe, and *offers a means for the development of any mineral resources, such as oil, which may be discovered on the reservation, for the benefit of the tribe.* In other words, it finally and fully confirms the title of these reservation lands to the individual Indians and to the tribe in such a way as to develop their homes and *to give the Indians the fullest possible benefit of their natural resources.* [emphasis added][190]

The result, then, was a very limited allotment act, calculated to meet two basic goals: (1) the allotment of 160 acres of surface to permit the development of individual homesteads; and (2) the confirmation and preservation of tribal title to all other lands and natural resources on the Reservation for tribal benefit—with this benefit for all tribal members being expected to flow, in particular, from the tribal development of Reservation minerals. The setting of a date, 50 years hence, for the future allotment of the minerals was nothing more than an administrative detail, ancillary and subservient to the fundamental congressional purpose of withholding all minerals from allotment so that

190. 67 Cong. Rec. 9886 (1926).

they might ultimately be developed for the benefit of the Tribe as a whole. To interpret this administrative detail as a bar against further congressional action designed to realize tribal mineral development would be a clear violation of the central intent of Congress in 1926.

d. *Federal Policy Contemporaneous With the Passage of the 1926 Act*

The intent of the 1926 Congress should be determined in light of then prevailing federal policies respecting both the Northern Cheyenne Tribe and the general concept of allotment. The federal attitude toward the Northern Cheyenne Tribe has already been described in detail (subsections a and b, *supra*). In short, responsible officials had long considered the Northern Cheyenne the most primitive of Indian tribes, singularly ineligible for allotment's "benefits." Thus, while by 1908 all other Montana tribes (except the Rocky Boy, which was never to be allotted) had received initial allotment acts—the Fort Belknap in 1888,[191] the Flathead in 1904,[192] the Crow in 1904,[193] the Blackfeet in 1907,[194] and the Fort Peck in 1908[195]—the Northern Cheyenne stood unallotted through the mid-1920s. Finally, however, in 1926 Secretary of the Interior, Hubert Work, begrudgingly recommended allotment for the Northern Cheyenne, but only after the Northern Cheyenne themselves had submitted their unprecedented 1925 tribal petition seeking surface land allotments.

However, by the time of the 1925 tribal petition, the

191. Act of May 1, 1888, 25 Stat. 113.
192. Act of April 23, 1904, 33 Stat. 302.
193. Act of April 27, 1904, 33 Stat. 352.
194. Act of March 1, 1907, 34 Stat. 1015, 1035.
195. Act of May 30, 1908, 35 Stat. 558.

allotment policy, which had dominated federal Indian policy since 1887,[196] was a clear failure and in the throes of critical reexamination:

> Friends of the Indian who were willing to face the facts must have been at their wit's end by 1925. Policies undertaken in the nineteenth century with sublime assurance of their ultimate success no longer appeared efficacious, even with good administration. The Indian death rate was exceeding the birth rate, and their economic position was clearly worsening. When tribal identity became blurred, one of the great objectives of the reformers was accomplished. But the stubborn Indians stoutly refused to become white men.[197]

> By all accounts, the allotment policy was a disaster. Destruction of the land base had the immediate effect of reducing tribal control of internal affairs to almost a nullity. Further, although the Indian culture was widely diverse from tribe to tribe, nowhere did that culture contain anything to prepare the individual Indian to become a farmer or to assume the incidents of private ownership. [footnotes omitted][198]

In fact, as early as 1922, the Indian-reform movement was pressuring for the abolishment of the allotment policy.[199]

It was in these circumstances in 1923 that Hubert Work was appointed Secretary of the Interior. He immediately ordered the commencement of a series of in-depth reassessments of federal Indian policy:

> When Hubert Work became Secretary of the Interior it was apparent to him that the only way to avoid

196. Act of February 8, 1887, 24 Stat. 388, 25 U.S.C. §§ 331 *et seq.* (1970).

197. W. HAGAN, AMERICAN INDIANS 150 (1961).

198. Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955, 959-60 (1972).

199. S TYLER, A HISTORY OF INDIAN POLICY 112 (1973).

> the continued needling of the reformers was to officially examine the Indian Service and recommend whatever changes seemed to be necessary.
>
> The first report to appear at his request was that of the Committee of One Hundred, a national advisory committee on Indian affairs. Completed in December of 1923, it appeared the next year as a congressional document bearing the title "The Indian Problem".
>
> . . . .
>
> The report of the Committee of One Hundred did not satisfy the reformers. . . . Still under public pressure and still feeling the need for further survey of the Bureau, Secretary Work called upon the Board of Indian Commissioners to investigate the Bureau and make recommendations to him. Their report was submitted January 26, 1926 . . . [T]hey recommended that a "non-governmental, disinterested organization, with a field force of experts" be engaged to make a study. . . .
>
> On June 12, 1926, Secretary Work officially requested W. F. Willoughby as Director of the Institute for Government Research to make the survey, which was . . . submitted to the Secretary of the Interior, February 21, 1928. Published and widely disseminated as a study of *The Problem of Indian Administration*, it accomplished what the Board of Indian Commissioners had predicted it would, and both the Congress and the general public were impressed.[200]

The Institute for Government Research survey (the "Meriam Report") sharply attacked the allotment policy.[201] This monumental study galvanized the Senate into action. In early 1928 the Senate began an unprecedented, exhaustive investigation into conditions on Indian reserva-

200. *Id.* at 113-14.

201. DEPT OF THE INTERIOR, THE PROBLEM OF INDIAN ADMINISTRATION 7-8 (1928).

tions,[202] which led shortly thereafter to the official termination of the allotment policy.[203]

Accordingly, in February 1926 when Secretary Work shaped and submitted to Congress a proposed Northern Cheyenne allotment act, the federal allotment policy was already in public disrepute and was the object of substantial official criticism and reassessment. The 1926 Act, then, was principally a product of three major pressures, all serving to produce a distinctly narrow allotment act: (1) the entrenched view of Federal officials that the Northern Cheyenne were simply not suitable for allotment; (2) the tribal view as expressed by the 1925 tribal petition which made but a narrow request for the allotment of surface lands only; and, (3) the increasingly widespread view—in both official anad unofficial circles—that the allotment policy had generally proven itself a failure.

The singularly *limited* nature of the 1926 Act is best revealed by comparing it to relevant prior allotment acts covering other reservations, particularly Montana reservations. The following allotment acts have been carefully reviewed: the Blackfeet Allotment Act of 1907, as amended;[204] the Fort Peck Allotment Act of 1908;[205] the Crow Allotment Act of 1920;[206] the Fort Belknap Allotment Act of

202. *See, Hearings on Survey of Conditions of the Indians in the United States Before the Senate Comm. on Indian Affairs*, 70th Cong.–78th Cong., (1928-43); W. HAGAN, AMERICAN INDIANS 153 (1961); S. TYLER, A HISTORY OF INDIAN POLICY 114-15 (1973).

203. THE INDIAN IN AMERICA'S PAST 117-18 (J. Forbes ed. 1964).

204. Act of March 1, 1907, 34 Stat. 1015, 1035; Act of June 30, 1919, 41 Stat. 3, 17.

205. Act of May 30, 1908, 35 Stat. 558.

206. Act of June 4, 1920, 41 Stat. 751.

1921;[207] and the Osage Allotment Act of 1906, as amended.[208]

It will be seen that these acts are generically different from the 1926 Act. Each of them is much more extensive in size and detail than the Northern Cheyenne Act,[209] vastly more pervasive in its assault on the system of tribal property, and far more liberal in its relinquishment of the incidents of the trust stewardship over tribal members and their allotments.

These other allotment acts have the following very significant characteristics, *not* contained in the Northern Cheyenne Act. *All* provide for the disposition of essentially the entire surface of the Reservation—by allotment to tribal members, or, by allotment of portions to tribal members and sale of the remainder to whites. *None* contain provisions remotely comparable to the all-encompassing reserved control and management provisions in sections 1 and 3 of the Northern Cheyenne Act. The Crow and Osage acts provide for distribution of the tribal treasury, declarations of competency for tribal members, and liberal alienability of allotted lands. The Blackfeet and Fort Peck acts also provide for distribution of the tribal treasury, and the Fort Belknap act bestows United States citizenship on the allottees and subjects them to state, civil and criminal laws. Summarily, the attribute these acts share, in con-

207. Act of March 3, 1921, 41 Stat. 1355.

208. Act of June 28, 1906, 34 Stat. 539; Act of March 3, 1909, 35 Stat. 778; Act of March 3, 1921, 41 Stat. 1249.

209. The Northern Cheyenne Allotment Act is 2 pages long and has 4 sections. In contrast, the Blackfeet act has 5 pages; the Fort Peck act has 6¼ pages and 16 sections; the Crow act has 6½ pages and 18 sections; the Fort Belknap act has 4¼ pages and 8 sections; and the Osage act has 6 pages and 12 sections.

trast to the Northern Cheyenne Act, is a significant relinquishment of federal control and responsibility in furtherance of Congress' desire to dismantle these tribal systems.

5. The 1968 Amendment Was An Exemplary Exercise of Congress' Plenary Power Over Indian Affairs and Comports With Current Public Policy.

Through the mid-1960's the intent of the 1926 Congress —that mineral development on the Northern Cheyenne Reservation inure to the benefit of the Northern Cheyenne people—was unrealized. The vast coal reserve beneath the Reservation remained dormant.[210] However, it presently became clear that the 1928 observation of Senate Investigator Liggett[211]—

> The entire Tongue River Reservation is underlaid with a thick vein of coal. There are frequent outcroppings. This coal seems to be a cross between lignite and bituminous coal and is of a fairly high quality . . . . . .
>
> The coal on Tongue River Reservation cannot be developed commercially at this time, owing to lack of rail facilities. There is no doubt, however, that some time the coal will prove a valuable asset.

was indeed prophetic.

In the late 1960's, national energy needs projected the untapped Northern Cheyenne coal reserve into the American energy arena. Rising national energy demands, new coal conversion techniques, and the superior economics of strip mining over deep mining created intense interest in western coal reserves. Moreover, the low sulphur content of the western coal made it especially attractive in light of

210. S. Rep. No. 1123, 90th Cong., 2d Sess. 2, 4 (1968).

211. *See* note 162, *supra*.

increasingly stringent air pollution standards, which traditional eastern coal could not meet.[212]

Prime among these western coal deposits is the immense Northern Cheyenne reserve. Totaling approximately 5.2 billion tons, it spans the entire Reservation.[213] Unusually great bed thicknesses, low overburdens, and gently rolling terrain render this coal ideal for strip mining.[214] The result: Northern Cheyenne coal has been elevated into a position of national significance with an economic value of no less than two billion dollars.[215] Major energy companies, including the Peabody, Amax, and Consolidation coal companies began pursuing rights to mine this coal.[216]

However, it became clear to the Cheyennes and to responsible government officials, that, while coal development on the Reservation might lift the people out of intense poverty, it might also result in destruction of the Northern Cheyenne culture. This culture is a product of a unique history, which caused Congress to wait until 1926 before enacting an allotment plan for the Northern Cheyennes. Congress then enacted the most limited of allotment acts, not providing for the opening of the Reservation to white

212. Coal Age, Mid-April 1973, Vol. 78, No. 5 at 41-48, 57-68.

213. U.S. Bureau of Mines, *Mineral Resources and Their Potential on Indian Lands—Northern Cheyenne Reservation, Big Horn and Rosebud Counties* 23 (unpublished).

214. The Montana Bureau of Mines and Geology estimates that one 13,560 acre section of the Reservation averages 88,500 recoverable tons per acre. Montana Dep't of Intergovernmental Relations—Division of Planning and Economic Development, Northern Cheyenne Planning Study 10 (1973).

215. This is a conservative estimate based on a recent offer by Shell Oil Company to the Crow Indian Tribe for coal located beneath the Crow Reservation, which adjoins the Northern Cheyenne Reservation on the west. Billings [Montana] Gazette, July 9, 1975, at 1, col. 1.

216. N. Y. Times, Aug. 22, 1971, at 1, col. 8.

settlement.[217] As a result, the Reservation today remains 98 per cent within Indian ownership.[218] Traditional grazing, farming, and timbering activities remain the predominant land uses. The absence of industrial development has left fully intact the grassy high plains and rolling hills. The Reservation population is overwhelmingly Indian; approximately 3,000 of some 3,600 enrolled Northern Cheyennes live on the Reservation.[219] Moreover, the Northern Cheyennes have retained the integrity of their Indian culture, the Cheyenne language is widely spoken, and traditional customs and rituals are practiced. In summary, the Northern Cheyenne Reservation remains what it has been from its inception: a homeland for a distinct Indian people and culture.

Strip mining, however, would affect every aspect of Reservation life and every member of the Reservation community. It would raise fundamental questions about the continued viability of the Reservation as a homeland.[220] Consequently, decisions concerning development require a deep sense of awareness of *all* competing benefits and costs. The United States Congress concluded that only the Northern Cheyenne people *as a whole* should make decisions concerning—and benefit from—coal development.[221] Pursuant to its duty and power as trustee, Congress implemented this determination by enacting the 1968 Amendment which maintains the Tribe as a whole as decisionmaker and beneficiary with respect to Reservation mineral development.[222]

The decision of the court below, however, annulled that congressional determination on constitutional grounds. The result will be chaotic decisionmaking with regard to 53 per cent of the coal reserve, and, potentially, a disastrous land rush reminiscent of those which devastated the oil-rich Indian reservations of Oklahoma.[223] Decisions regarding development of that portion of the reserve will thus be made simply on the basis of the economic self-interests of the individual members of the respondent class,[224] without

217. By contrast, sale of unallotted lands to whites was a key element of the allotment acts given other allotted reservations in Montana. Crow: Act of June 4, 1920, 41 Stat. 751; Blackfeet: Act of March 1, 1907, 34 Stat. 1015, 1035; Fort Peck: Act of May 30, 1908, 35 Stat. 558; Flathead: Act of April 23, 1904, 33 Stat. 302.

218. MONTANA DEP'T OF INTERGOVERNMENTAL RELATIONS—DIVISION OF PLANNING AND ECONOMIC DEVELOPMENT, NORTHERN CHEYENNE PLANNING STUDY 34 (1973).

219. *Id.* at 45.

220. Washington Post, June 11, 1973, at A1, Col. 1; N. Y. Times, Feb. 5, 1973, at 19, col. 1.

221. H. R. REP. No. 1292, 90th Cong., 2d Sess. (1968); S. REP. No. 1145, 90th Cong., 2d Sess. (1968)

222. Secretary of the Interior Rogers C. B. Morton held similarly in a decision on a Tribal petition concerning coal development on the Reservation presented directly to him in January, 1974. After extensive personal deliberation, Secretary Morton held:

> As trustee I take cognizance of my responsibility to preserve the environment and culture of the Northern Cheyenne Tribe and will not subvert these interests to anyone's desires to develop the natural resources on that Reservation.
>
> . . . . Furthermore, the Tribe and the coal companies may be assured that the terms and conditions upon which mineral development may proceed on the Northern Cheyenne Reservation will require their joint agreement and support prior to any further approval by me.

DEP'T OF THE INTERIOR, Written Decison of Secretary of the Interior Rogers C. B. Morton Regarding Northern Cheyenne Coal Development (June 4, 1974) (unpublished). This determination is reaffirmed in the Memorandum Setting Forth the Views of the Department of the Interior. Memorandum for the United States at 13-15, filed herein.

223. A. DEBO, AND STILL THE WATERS RUN—THE BETRAYAL OF THE FIVE CIVILIZED TRIBES 86-88, 285-90, 294, 336-50 (1972 ed.).

224. This is a disparate group consisting primarily of tribal members, but also including a substantial number of non-member Indians and whites. Many of these people live far from the Reservation, and have no immediate interest in the general welfare of the residents of the Reservation. *See* notes 6 & 7, *supra*.

regard to the general welfare of the Tribe as a whole. Moreover, since each allotment is multiply-owned, each member of the class will control only a fractional interest in the minerals under his own allotment. Therefore, he will be vulnerable to unscrupulous land speculators who historically have descended upon newly-allotted reservations to exploit the distributed lands and resources.[225] Indeed, in 1934,[226] Congress acted to end permanently the allotment system because of the massive Indian land losses produced by this system.[227] It would be tragically ironic if that scenario were reenacted on the Northern Cheyenne Reservation in 1976 because of a future allotment provision enacted in 1926, only eight years prior to Congress' closing of the allotment chapter of American Indian history.

These dangers have resulted directly from the Ninth Circuit's decision striking down the 1968 Amendment on constitutional grounds. That erroneous and drastic judicial action requires reversal by this Court.

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225. Cohen, *Handbook of Federal Indian Law* 215-17 (1941). In fact, promptly after the court below entered its decision, such persons appeared on the scene to "assist" the allottees in marketing their coal interests. One approach suggested the formation of a society "to assist members with money matters so that they and their heirs will receive monthly checks for 100 years or more." These efforts continue. Hardin [Montana] Herald, Nov. 27, 1975, at 9, col. 3; Billings [Montana] Gazette, Nov. 12, 1975, at 1, col. 1.

226. Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. §§ 461-62 (1970).

227. Hearings on H. R. 7902 Before the House Committee on Indian Affairs, 73d Cong., 2d Sess. 15-18 (1934). During the period of the allotment policy, 1887-1934, staggering damage was done to the Indian land base—90 million acres were lost. THE INDIAN, AMERICA'S UNFINISHED BUSINESS 20 (S. Aberle & W. Brophy ed. 1966).

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

December 12, 1975

ZIONTZ, PIRTLE, MORISSET,
ERNSTOFF & CHESTNUT
By STEVEN H. CHESTNUT
Counsel for Petitioner

APPENDIX

NORTHERN CHEYENNE ALLOTMENT ACT OF 1926

Act of June 3, 1926, 44 Stat. 690

An Act to provide for allotting in severalty lands within the Northern Cheyenne Indian Reservation in Montana, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Northern Cheyenne Indian Reservation heretofore set apart by Executive order dated the 19th day of March, 1900, for the permanent use and occupation of the Northern Cheyenne Indians in Montana, be, and the same is hereby, declared to be the property of said Indians, subject to such control and management of said property as the Congress of the United States may direct.

Sec. 2. That the Secretary of the Interior be, and he is hereby, authorized to cause to be prepared a complete roll containing the names of all said Northern Cheyenne Indians now living, for whom said reservation was set apart as aforesaid, which roll, when approved by him, shall be the basis for allotting the land on said reservation, as herein provided. The Secretary of the Interior shall also cause to be prepared, in such manner as he may deem advisable, a list of the lands of said Indian reservation and to classify the same as agricultural, grazing, and land chiefly valuable for the timber thereon. As soon as practicable after the approval of said tribal roll and after the approval of said list of lands classified as above provided, the Secretary of the Interior is hereby authorized to allot in severalty lands classified as agricultural and grazing to the duly enrolled Indians in areas not exceeding one hundred and sixty acres to any individual from the lands appearing on said approved list: *Provided,* That in allotting said lands each Indian shall be allotted a proportion of the agricultural and grazing lands, respectively, such lands whenever practicable and so far as possible to be contiguous: *Provided,* That trust patents shall be issued therefor of the form and legal effect authorized by the

Act of February 8, 1887 (Twenty-fourth Statutes at Large, page 388), as amended, and the lands so allotted and patented shall be designated in each case as a "homestead," which homestead shall remain inalienable and nontaxable for a period of twenty-five years from the date of issuance of patent therefor, or until the death of the allottee.

The right is hereby reserved to any Indian to select as his allotment a tract occupied by him at the time of the approval of this Act, though such lands or a part thereof may be classified as timber lands.

Sec. 3. That the timber, coal or other minerals, including oil, gas, and other natural deposits, on said reservation are hereby reserved for the benefit of the tribe and may be leased with the consent of the Indian council under such rules and regulations as the Secretary of the Interior may prescribe: *Provided,* That at the expiration of fifty years from the date of the approval of this Act the coal or other minerals, including oil, gas, and other natural deposits, of said allotments shall become the property of the respective allottees or their heirs: *Provided further,* That the unallotted lands of said tribe of Indians shall be held in common, subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians.

Sec. 4. That authority is hereby vested in the Secretary of the Interior to cause to be reserved so long as they are needed and used for the benefit of the Northern Cheyennes, suitable lands for the following purposes: For school, agency, and other administrative purposes, including not to exceed one thousand two hundred and eighty acres for the boarding school at Busby, Montana, and not to exceed one hundred and sixty acres for the Birney Day School, in all not exceeding two thousand seven hundred and eighty acres; for tribal cemeteries, where needed, not to exceed in all one hundred and sixty acres: *Provided,* That with the consent of the tribal council, lands may be reserved for religious and educational purposes, including parsonage, church, cemetery, and garden sites, not to exceed forty acres at any one point; for recreational purposes having an educational feature, not to exceed ten

acres at any one point; for public-school purposes, not to exceed two and one-half acres at any one point: *Provided further,* That such tracts, excepting only the tribal cemeteries, shall remain reserved only so long as they are used for the purposes for which they are set apart: *And provided further,* That the organizations now engaged in educational and religious work on the reservation shall not be disturbed in their occupancy of the sites heretofore set apart under authority of the Secretary of the Interior so long as they continue to be used solely in the advancement of religious and welfare work for the benefit of the Northern Cheyenne Indians: *And provided further,* That the Secretary of the Interior is hereby authorized to reserve and set aside for town-site purposes not more than eighty acres at Lame Deer, Montana, and not to exceed forty acres at some other suitable location, and to survey and plat said tracts in blocks, lots, streets, alleys, parks, and school sites: *Provided further,* That the area reserved for park and school sites shall not exceed ten acres in any one town site, and patent shall be issued for such lands to the municipality legally charged with the care and custody of the lands hereby set aside for such purposes. That such town sites shall be appraised and disposed of as provided in section 2381 of the Revised Statutes: *Provided further,* That all the income of said tribe from rents, royalties, or other profits accruing from the sale of any timber, coal, or other minerals, including oil, gas, and other natural deposits herein reserved for the benefit of the said Indians, including proceeds from sales of town lots, shall be deposited in the Treasury of the United States to the credit of the Northern Cheyenne Indians and be subject to expenditure for their benefit in such manner as Congress may direct. An area not exceeding sixty feet on either side of every section line within the said reservation is hereby dedicated as public highways whenever and so far as the same may be so declared by the county commissioners of the county in which the same may be situated, and all allotments and patents hereby authorized shall be subject to the easement hereby created. In addition to reservations heretofore herein authorized the Secretary of the Interior shall withhold from allotment any tracts in legal subdivisions

in which are springs or other like sources of water supply to which cattle have been accustomed to repair for drink, together with so much land contiguous thereto as may be necessary to permit access by stock to such water supply from the highways herein provided for.

Sec. 5. That there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $30,000, or so much thereof as may be necessary, to pay the expenses of making the tribal roll, of compiling the list of lands on said reservation, for the necessary surveys and classifications, and all other expenses in connection with the allotment work: *Provided,* That the sum of $2,500 shall be available for the payment of the expenses of the tribal Indian council in holding meetings on said reservation and for the expenses of delegates which such council may have heretofore sent, or may hereafter send, to the city of Washington on tribal business.

1947 AMENDMENT TO NORTHERN CHEYENNE ALLOTMENT ACT

Act of July 24, 1947, 61 Stat. 418

An Act to declare the ownership of the timber on the allotments on the Northern Cheyenne Indian Reservation, and to authorize the sale thereof.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, notwithstanding the provisions of the Act of June 3, 1926 (44 Stat. 690), the timber on the allotments on the Northern Cheyenne Indian Reservation, whether or not the lands were hitherto classified as chiefly valuable for timber, are hereby declared to be the property of the allottees and may hereafter be sold pursuant to the provisions of section 8 of the Act of June 25, 1910 (36 Stat. 857; 25 U.S.C., sec. 406). Nothing contained in this Act shall be construed to require the payment to the allottees of the proceeds of sales made prior to the passage of this Act.

1961 AMENDMENT OF NORTHERN CHEYENNE ALLOTMENT ACT

Act of September 22, 1961, 75 Stat. 586

An Act to grant minerals, including oil, gas, and other natural deposits, on certain lands in the Northern Cheyenne Indian Reservation, Montana, to certain Indians, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 3 of the Act of June 3, 1926 (44 Stat. 690), as amended by the Act of July 24, 1947 (61 Stat. 418), is hereby amended to read as follows:

"Sec. 3. (a) The coal or other minerals, including oil, gas, and other natural deposits, on said reservation are hereby reserved for the benefit of the tribe and may be leased with the consent of the Indian council for mining purposes in accordance with the provisions of the Act of May 11, 1938 (52 Stat. 347; 25 U.S.C. 396 a-f), under such rules, regulations, and conditions as the Secretary of the Interior may prescribe: *Provided,* That at the expiration of fifty years from the date of the approval of this Act, the coal or other minerals, including oil, gas, and other natural deposits, of said allotments shall become the property of the respective allottees or their heirs or devisees, subject to any outstanding leases, regardless of any prior conveyance by such allottee, heirs, or devisees of the land overlying such minerals, oil, gas or other natural deposits and regardless of the form of reference in such conveyance, or lack of reference, to the minerals, oil, gas, or other natural deposits reserved by this Act.

"(b) Title to the minerals so granted shall be held by the United States in trust for the Indian owners, except that if upon the expiration of said fifty years the entire Indian interests in the minerals within any allotment or parcel thereof is granted by this Act to a person or persons who at that time hold an unrestricted title to the lands overlying such minerals, oil, gas, or other natural deposits, then the Secretary of the Interior shall by fee patent transfer to such person or persons the unrestricted fee simple

title to such minerals, oil, gas, or other natural deposits, which title shall vest in such person or persons as of the date of the patent.

"(c) The unallotted lands of said tribe of Indians shall be held in common, subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians."

1968 AMENDMENT OF NORTHERN CHEYENNE ALLOTMENT ACT

Act of July 24, 1968, 82 Stat. 424

An Act to grant minerals, including oil, gas, and other natural deposits, on certain lands in the Northern Cheyenne Indian Reservation, Montana, to certain Indians, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 3 of the Act of June 3, 1926 (44 Stat. 690), as amended by the Act of July 24, 1947 (61 Stat. 418), and the Act of September 22, 1961 (75 Stat. 586), is hereby amended to read as follows:

"Sec. 3 (a) The coal or other minerals, including oil, gas and other natural deposits, on said reservation are hereby reserved in pepetuity for the benefit of the tribe and may be leased with the consent of the Indian council for mining purposes in accordance with the provisions of the Act of May 11, 1938 (52 Stat. 347; 25 U.S.C. 396 a-f), under such rules, regulations, and conditions as the Secretary of the Interior may prescribe.

"(b) The unallotted lands of said tribe of Indians shall be held in common, subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians."

SEC. 2. The Northern Cheyenne Tribe is authorized to commence in the United States District Court for the District of Montana an action against the allottees who received allotments pursuant to the Act of June 3, 1926, as amended, their heirs or devisees, either individually or as a class, to determine whether under the provisions of

the Act of June 3, 1926, as amended, the allottees, their heirs or devisees, have received a vested property right in the minerals which is protected by the fifth amendment. The United States District Court for the District of Montana shall have jurisdiction to hear and determine the action and an appeal from its judgment may be taken as provided by law. If the court determines that the allottees, their heirs or devisees, have a vested interest in the minerals which is protected by the fifth amendment, or if the tribe does not commence an action as here authorized within two years from the date of this Act, the first section of this Act shall cease to have any force or effect, and the provisions of section 3 of the Act of June 3, 1926, as amended by the Acts of July 24, 1947, and September 21 [*sic*], 1961, shall thereupon be carried out as fully as if section 3 had not been amended by this Act.

Executive Order of November 26, 1884

Establishing Northern Cheyenne Reserve.

It is hereby ordered that the following-described country, lying within the boundaries of the Territory of Montant, viz: Beginning at the point on the one hundred and seventh meridian of west longitude (said meridian being the eastern boundary of the Crow Indian Reservation) where the southern 40-mile limits of the grant to the Northern Pacific Railroad Company intersects said one hundred and seventh meridian; thence south along said meridian to a point 30 miles south of the point where the Montana base line, when extended, will intersect said meridian; thence due east to a point 12 miles east of the Rosebud River; thence in a northerly and northeasterly direction, along a line parallel with said Rosebud River and 12 miles distant therefrom, to a point on the southern 40-mile limits of the grant to the Northern Pacific Railroad Company, 12 miles distant from said Rosebud River; thence westerly along the said southern limits and across the said Rosebud River to the place of beginning, be, and the same is hereby, withheld from sale and settlement, and set apart as a reservation for the use and occupation of the Northern Cheyenne Indians, now residing in the southern portion of Montana Territory, and such other Indians as the Secretary of

the Interior may see fit to locate thereon: *Provided, however*, That any tract or tracts of land included within the foregoing described boundaries which have been located, resided upon, and improved by bona fide settlers, prior to the 1st day of October, 1884, to the amount to which such settlers might be entitled under the laws regulating the disposition of the public lands of the United States, or to which valid rights have attached under said laws, are hereby excluded from the reservation hereby made.

CHESTER A. ARTHUR

Executive Order of March 19, 1900

Enlarging Northern Cheyenne Reserve

It is hereby ordered that the following-described tract of land lying in the State of Montana, the same being the tract described in Senate bill 2173, 56th Congress, 1st session, which tract includes the lands embraced in the boundaries set forth in Executive order issued November 26, 1884, relative to the Northern Cheyenne reserve, be, and the same is hereby, withdrawn from sale and settlement and set apart as a reservation for the permanent use and occupation of the Indians now occupying or belonging upon the Northern Cheyenne Reservation, which reservation shall be known as the Northern Cheyenne Indian Reservation, viz:

Beginning at the point in the middle of the channel of Tongue River at its intersection with the southern forty-mile limits of the grant to the Northern Pacific Railroad Company; thence west on the said southern forty-mile limits to its intersection with the eastern boundary line of the Crow Indian Reservation; thence south on said boundary line to its intersection with the line dividing townships five and six south; thence east on said dividing line of townships five and six south; to its intersection with the line dividing ranges forty and forty-one east; thence north on said line dividing ranges forty and forty-one east to the line dividing townships four and five south; thence east on the line dividing townships four and five south to its intersection with Cook Creek; thence down Cook Creek to its confluence with Tongue River; thence down the

middle of the channel of Tongue River to the place of beginning: *Provided, however*, That if upon the survey or resurvey of the boundary lines already established it shall be found that the main stream of Cook Creek on or near the range line between ranges forty and forty-one lies south of the line dividing townships four and five south, then in that case the line running north on the range line between ranges forty and forty-one shall extend north only to the intersection of said line with the main stream of Cook Creek, and thence down Cook Creek as hereinbefore provided: *Provided further*, That in the erection of the reservation boundary fence along said Cook Creek the same shall be so erected as to divide the waters as near as may be between the north and south sides thereof: *Provided further*, That certain tracts approximating sixty-five acres, lying west of Tongue River, in sections twenty-six and thirty-four south, of range forty-three east, owned by Joseph Scott, and the northeast quarter of section three in township three south, of range forty-four east, belonging to Saint Labra's Mission, and the south half of the northwest quarter of section ten in township two south, of range forty-four east, belonging to R. P. Colbert, and the south half of section seven, in township two south, range forty-four east, belonging to John Barringer, shall be excepted from and not included within the reservation boundaries named.

WILLIAM MCKINLEY

SELECTED LEGISLATIVE HISTORY OF NORTHERN CHEYENNE ALLOTMENT ACT OF 1926

The Original Bill—H.R. 9558, 69th Cong., 1st Sess. (1926)

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 19, 1926

MR. LEAVITT introduced the following bill; which was referred to the Committee on Indian Affairs and ordered to be printed

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A BILL

To provide for allotting in severalty agricultural lands within the Tongue River or Northern Cheyenne Indian Reservation in Montana, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized to cause to be prepared a complete roll containing the names of all Indians ascertained to have rights on the Tongue River or Northern Cheyenne Indian Reservation in Montana, which roll, when approved by him, shall be final and conclusive evidence of the right of any Indian of that reservation to an allotment of land thereon. The Secretary of the Interior shall also cause to be prepared, in such manner as he may deem advisable, a list of the lands of said Indian reservation, exclusive of timbered lands, which may be used advantageously for agricultural purposes, without detriment to the use of the remaining tribal lands for grazing purposes: *Provided,* That as soon as practicable after the approval of said tribal roll, and after the approval of said list of agricultural lands, the Secretary of the Interior is hereby authorized to make allotments in severalty to the duly enrolled Indians in areas not exceeding eighty acres to any individual, from the lands appearing on said approved list; which allotments shall be made under such regulations as he may prescribe and trust patents shall be issued therefor of the form and legal effect authorized by the Act of

February 8, 1887 (Twenty-fourth Statutes at Large, page 388), as amended by the Act of May 8, 1906 (Thirty-fourth Statutes at Large, page 182).

SEC. 2. That prior to making the allotments as authorized herein the Secretary of the Interior shall cause an examination to be made by representatives of the Geological Survey of all lands included on said approved list as available for allotting, for the purpose of determining the mineral character thereof, also their power or reservoir possibilities; and if any of the land shall be found to contain coal or other minerals, only the surface thereof may be allotted, and all minerals on said lands are hereby reserved for the benefit of the tribe: *Provided,* That at the expiration of fifty years from the date of the approval of this Act, the coal or other mineral deposits of said allotments shall become the property of the respective allottees or their heirs or assigns.

SEC. 3. That there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $10,000, or so much thereof as may be necessary, to pay the expenses of making the tribal roll, of compiling the list of lands suitable for allotting, for the necessary surveys and classifications, and all other expenses in connection with the allotment work.

House Committee on Indian Affairs Report—H.R. REP. NO. 383, 69th Cong., 1st Sess. (1926)

AGRICULTURAL LANDS WITHIN THE TONGUE RIVER OR NORTHERN CHEYENNE INDIAN RESERVATION, MONT.

FEBRUARY 25, 1926.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed

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Mr. LEAVITT, from the Committee on Indian Affairs, submitted the following

REPORT

[To accompany H. R. 9558]

The Committee on Indian Affairs, to whom was referred the bill (H. R. 9558) to provide for allotting in severalty agricultural lands within the Tongue River or Northern Cheyenne Indian Reservation in Montana, and for other purposes, having considered the same, report thereon with a recommendation that it do pass with the following amendments:

Page 1, line 9, after the word "reservation," insert the words "upon said roll."

Page 2, line 22, strike out all of line 22 and the word "minerals," in line 23, and insert "*Provided, however,* That."

Page 2, line 23, strike out the word "thereof" and insert the following, "of any lands in this reservation."

Page 2, line 25, after the word "provided," insert the word "further."

This bill is recommended by the Secretary of the Interior, as evidenced by the attached letter, which is made a part of this report.

DEPARTMENT OF THE INTERIOR,
Washington, February 17, 1926.

Hon. SCOTT LEAVITT,
Chairman Committee on Indian Affairs,
House of Representatives.

MY DEAR MR. LEAVITT: Your attention is respectfully invited to the inclosed draft of a proposed bill authorizing the Secretary of the Interior to allot agricultural lands of the Tongue River or Northern Cheyenne

Indian Reservation in Montana to the Indians of that reservation in areas not exceeding 80 acres to each individual.

The records show that there are approximately 1,408 Indians on that reservation and the area is 489,500 acres. The reservation was established by Executive orders of November 26, 1894 [*sic*], and March 19, 1900. Up to the present none of the lands there have been allotted in severalty for the reason that it has been thought best to keep the entire reservation in tribal status for general grazing purposes. It is now believed that a part of the agricultural lands may be advantageously allotted by exercising care to group the allotments so as not to interfere with the grazing industry. In order to avoid difficulty in protecting the grazing area from allotment selections it is deemed advisable to have the agricultural lands that may be allotted officially listed before the allotment selections are made and also have it understood that only lands included on the approved list may be selected.

The proposed bill also provides for the preparation of a roll of the Indians having rights on that reservation; also for a report by the Geological Survey, covering the lands that may be listed for allotment, as to coal and other mineral deposits and as to power or reservoir sites. In the event any of the land listed for allotting is found to contain coal or other minerals, it is contemplated to reserve all such minerals for the tribe and to allot the surface only. Timbered lands are also to be excluded from the list of lands available for allotment selections.

It will be necessary to provide funds to cover the expenses of preparing the roll of eligible Indians and of listing the lands available for allotting, as well as the general expenses of surveying and marking the allotment selections; therefore the authorization of an appropriation of $10,000, or as much thereof as may be needed, has been included in the proposed legislation. The draft of the proposed bill as submitted covers the various features discussed, and the favorable consideration thereof is respectfully recommended to your committee and the Congress.

The Bureau of the Budget advised on February 1, 1926, that the appropriation would not be in conflict with the financial program of the President.

Very truly yours,

HUBERT WORK.

Senate Committee On Indian Affairs Report—S. REP. NO. 638, 69th Cong., 1st Sess. (1926)

ALLOTTING IN SEVERALTY AGRICULTURAL LANDS WITHIN TONGUE RIVER OR NORTHERN CHEYENNE INDIAN RESERVATION, MONT.

APRIL 19 (calendar day, APRIL 21), 1926.—Ordered to be printed

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Mr KENDRICK, from the Committee on Indian Affairs, submitted the following

REPORT

[To accompany H. R. 9558]

The Committee on Indian Affairs, to whom was referred the bill (H. R. 9558) to provide for allotting in severalty agricultural lands within the Tongue River or Northern Cheyenne Indian Reservation in Montana, and for other purposes, having considered the same, report favorably thereon with the recommendation that the bill do pass with the following amendments:

Strike out all after the enacting clause and insert in lieu thereof the following:

That the Northern Cheyenne Indian Reservation heretofore set apart by Executive order dated the 19th day of March, 1900, for the permanent use and occupation of the Northern Cheyenne Indians in Montana be, and the same is hereby, declared to be the property of said Indians, subject to such control and management of said property as the Congress of the United States may direct.

SEC. 2. That the Secretary of the Interior be, and he is hereby, authorized to cause to be prepared a complete roll containing the names of all said Northern Cheyenne Indians, for whom said reservation was set apart as aforesaid, and their heirs, which roll, when approved by him, shall be the basis for alloting the land on said reservation, as herein provided. The Secretary of the Interior shall also cause to be prepared, in such manner as he may deem advisable, a list of the lands of said Indian reservation and to classify the same as agricultural, grazing, and land chiefly valuable for the timber thereon. As soon as practicable after the approval of said tribal roll and after the approval of said list of lands classified as above provided, the Secretary of the Interior is hereby authorized to allot in severalty to the duly enrolled Indians in areas not exceeding 160 acres to any individual from the lands appearing on said approved list: *Provided*, That in allotting said lands each Indian shall be allotted a proportion of the agricultural, grazing, and timberlands, respectively: *And provided further*, That any Indian desiring to secure contiguous territory for his allotment may be allotted grazing land in lieu of his or her proportion of agricultural land and trust patents shall be issued therefor of the form and legal effect authorized by the act of February 8, 1887 (Twenty-fourth Statute [*sic*], page 388), as amended.

SEC. 3. That the timber, coal or other minerals, including oil, gas, and other natural deposits on said reservation, are hereby reserved for the benefit of the tribe: *Provided*, That at the expiration of fifty years from the date of the approval of this act the coal or other minerals, including oil, gas, and other natural deposits of said allotments shall become the property of the respective allottees or their heirs: *Provided further*, That the unallotted lands of said tribe of Indians shall be held in common, subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians.

SEC. 4. That before any allotment shall be made as herein authorized there shall be reserved on said reservation sufficient land for schools, agency, cemetery, town site, recreation, and missionary purposes: *Provided*, That no such reservation shall exceed five acres for public schools, six hundred and forty acres for agency, one hundred and sixty acres for recreation purposes, five acres for cemetery purposes, two acres for missionary purposes, and eighty acres for town site purposes at Lame Deer, Montana, and forty acres elsewhere; said town sites to be platted and subdivided in lots, streets, and alleys in accordance with rules and regulations to be prescribed by the Secretary of the Interior: *Provided further*, That the Secretary of the Interior shall be authorized to lease, sell, or otherwise dispose of said lots within said town sites in accordance with existing law, and such mercantile timber as may be on unallotted lands, and to deposit the avails thereof in the Treasury of the United States to the credit of the Northern Cheyenne Indians: *Provided further*, That all the income of said tribe from rents, royaltics, or other profits accruing from sale of any timber, coal, or other minerals, including oil, gas, and other natural deposits herein reserved for the benefit of the said Indians, including proceeds from sales of town lots, shall be distributed per capita to said Indians on the 1st day of July and the 1st day of January in each year, except 10 per centum thereof, which shall be applied and expended for the education of the children of said Indians: *Provided further*, That said 10 per centum fund shall be used proportionately among such children to be educated, and the said Indians shall be subject to the laws of the State of Montana with reference to compulsory education.

SEC. 5. That there is hereby authorized to be appropriated out of any money in the Treasury not otherwise appropriated, the sum of $30,000, or so much thereof as may be necessary to pay the expenses of making the tribal roll, of compiling the list of lands on said reservation, for the necessary surveys and classifications, and all other expenses in connection with the allotment work: *Provided*, That the sum of $2,500 shall be available for the payment of the expenses of the tribal Indian council in holding meetings on said reservation and for the expenses of delegates which such council may have heretofore sent, or may hereafter send, to the City of Washington on tribal business.

Amend the title to read as follows: "To provide for allotting in severalty lands within the Northern Cheyenne Indian Reservation in Montana, and for other purposes."

This bill in its original form was introduced at the request of the department and the facts are set out in House Report No. 383, Sixty-ninth Congress, first session, which is attached hereto and made a part of this report.

An identical bill was introduced in the Senate at the department's request, and was numbered S. 3261. Later the Secretary of the Interior requested that the bill be amended by inserting a new section and his letter to that effect, under date of April 13, 1926, is also attached hereto and made a part of this report. The bill which your committee reports is similar to the departmental bill with the amendment suggested in the Secretary's letter of April 13, 1926.

[Next followed a reprint of the above House Committee on Indian Affairs Report. The report then concluded with the following letter.]

DEPARTMENT OF THE INTERIOR,
Washington, April 13, 1926.

Hon. J. W. HARRELD,
Chairman Committee on Indian Affairs,
United States Senate.

MY DEAR SENATOR HARRELD: Referring to Senate bill 3261 providing for the allotment of agricultural lands on the Tongue River and Northern Cheyenne Reservation in Montana, our attention is invited by the representatives of the General Council of Mennonites of North America to the fact that the omission therein of any provision which would protect their organization in its work for the benefit of the Indians of that reservation is embarrassing to them.

It is believed that mission organizations should not be disturbed in their occupancy of sites heretofore set apart for their use under department authorities. There will undoubtedly be need for extension of their work or for the establishment of missions of other denominations as the Indians themselves advance. It is therefore requested that the bill be amended by changing the numbering of the present section 3 to section 4 and inserting after line 4 on page 3 a new section 3 to read as follows:

"SEC. 3. That authority is hereby vested in the Secretary of the Interior to cause to be reserved, so long as they are needed and used for the benefit of the Northern Cheyennes, suitable lands for the following purposes: For school, agency and other administrative purposes not to exceed in all six hundred and forty acres; for tribal cemeteries at points needed, not to exceed in all one hundred and sixty acres; with the consent of the tribal council lands required for religious and educational purposes including parsonage, church, cemetery, and garden sites, not to exceed forty acres at any one point; for recreational purposes having an educational feature, not to exceed ten acres at any one point; for public-school purposes, not to exceed two and one-half acres at any one point: *Provided*, That such tracts excepting only the tribal cemeteries shall remain reserved only so long as they are used for the purposes for which they are set apart: *Provided further*, That the organizations now engaged in educational and religious work on the reservation shall not be disturbed in their occupancy of the sites heretofore set apart under authority of the Secretary of the Interior so long as they continue to be used solely in the advancement of religious and welfare work for the benefit of the Northern Cheyenne Indians."

There is no good reason why such provisions should not finally satisfy the Indians, since they place in the tribal council the right to pass upon all future petitions for mission sites. At the same time the rights of the present missions are fully protected.

It is requested that this proposed amendment receive your favorable action.

Very truly yours,

HUBERT WORK.